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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

GEOFFREY WALDAU, Petitioner

v.

MICHAEL S. COUGHLIN, et al., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether U.S. Postal Service orders prohibiting an employee economist's unpopular, prospective speech supporting competition and privatization, and subsequent discharge of employee, is content-based restriction of protected speech and viewpoint discrimination, thereby a *per-se* violation of the Free Speech Clause of the First Amendment according to Supreme Court precedent?

2. Whether a U.S. district court's grant of summary judgment to government is in conflict with Supreme Court doctrine requiring a four-element inquiry into public employee speech cases, where there exists a reasonable inference that the speech was a contributing factor in the employer's action, the agency's investigation and beliefs would not be reasonable, and the employee was really discharged to expel a particular viewpoint from within the agency -- as to which the courts of appeal are in conflict?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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II. INTRODUCTORY PRAYER

Petitioner, Geoffrey J. Waldau, prays that the Supreme Court grant a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in this case.

III. CITATIONS TO OPINIONS BELOW

The per curiam Order and Mandate of the court of appeals (App., *infra*, 1-2) is not published. The Order and Memorandum of the district court (App., *infra*, 3-13) is not published.

IV. STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. Sec. 1331. Federal District Courts have original jurisdiction over "all civil actions arising under the constitution, laws, or treaties of the United States."

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 25, 1997. The court of appeals denied a timely petition for rehearing on

October 31, 1997 and issued a mandate on November 14, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

V. STATUTES, CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The United States Constitution First Amendment forbids suppression of free speech and peaceable assembly. Title 39 U.S.C. Sec. 601 permits the U.S. Postal Service ("USPS") to suspend its monopoly where in the public interest. USPS employee regulations forbid decision making by employees outside official channels, unauthorized use of resources, and disobeying orders of superiors. USPS regulations also requires adherence to the *Congressional Code of Ethics for Government Service* which states that employees should put loyalty to country above loyalty to persons or a government department and "seek to find and employ more efficient and economical ways of getting tasks accomplished." See, App., *infra*, 17-19.

VI. STATEMENT OF CASE

Statement of Facts[1]

Petitioner, Geoffrey Waldau was employed by the United States Postal Service ("USPS") from 1979 until his termination on September 17, 1990. The office in which Waldau worked was responsible for setting operating policy, researching and conducting studies and recommending ways to improve the efficiency and service quality of the USPS. Waldau's duties, among others, were to research and respond to inquiries on privatization issues. He was not a prominent,

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[1] A more detailed statement of the facts including citations is included in the Appendix, *infra*, 21-41.

policy-level employee, nor an official spokesperson for the USPS.

Waldau's work and experiences within the USPS convinced him that a vibrant, robustly competitive postal industry would benefit the USPS, the industry and the American people, by bringing greater efficiency, lower prices, better quality services and more innovation. Waldau also believed employee stock ownership could create incentives for better performance, new ideas, and new and better services from current employees.

Many, but not all, postal officials opposed competition and privatization in 1990. To promote opposition, internal discussions were organized, including the viewing of a USPS-produced video showing a "downward spiral" caused by competition. In public forums and employee communications publications, Postmaster General Anthony Frank stated, "Privatization is unthinkable," and "Alternative [competitor] delivery dismays me, annoys me, angers me." USPS Board of Governors Chairman, Robert Setrakian stated that privatization would be "detrimental to the public at large."

Waldau could not agree, but kept silent with his pro-competition views, waiting for a change in leadership and political winds. Meanwhile, he felt it reasonable and in the public interest to gather information on privatization by (1) conducting a small citizen survey in March 1990 and (2) preparing a proposal and presentation in June 1990, to be first delivered to the same group of investment bankers who had participated and provided early input in the Conrail railroad privatization. Waldau knew the government officials involved in the Conrail privatization. Early investment banker input was obtained due to the many complex restructuring alternatives. Waldau believed these activities were consistent with his general duties to be prepared to "answer questions on privatization" from time to time.

Waldau was a "very-good" rated employee, had used postal resources on self-initiated projects in the past without needing express permission, had no prior disciplinary prob-

lems, was never cited as disruptive, and got along well with his superiors and co-workers.

In July of 1990, Waldau arranged to speak to members of five Wall Street investment banks on the topic of postal privatization in New York City ("NYC"). The Postal Service learned of the speech and ordered Waldau to cancel it. When Waldau attempted to give the speech anyway, on his own time and at his own expense, the USPS again learned of the rescheduled speech, canceled it, and discharged Waldau. The Postal Service charged Waldau with numerous violations to employee regulations in conjunction with the speech, e.g., misrepresentation, decision making outside official channels, illegal use of resources, disobeying orders, and lying. Waldau denies the charges.

Since 1990, the competition and privatization issues have been debated in the press and halls of Congress. In 1995, the Washington Post reported that privatization debate was "welcomed" by the new Postmaster General, Marvin Runyon, appointed in 1992, "unlike his predecessors."

Procedural History

Waldau appealed his removal at the U.S. Merit Systems Protection Board ("MSPB") but was unable to establish jurisdiction as a "management employee" after a 5 year contest. In 1995, he filed suit in U.S. District Court for the District of Columbia, claiming his discharge was in violation of the First Amendment, and prayed for equitable relief in the form of reinstatement and back pay. The parties cross-motioned for summary judgment. Waldau also opposed the government's motion. Waldau stated a trial would be necessary to resolve disputed facts. On March 27, 1997, the court granted the government's motion for summary judgment dismissing the suit without trial. Waldau motioned for a trial, reconsideration, and correction to material error and government opposed. On June 10, 1997, the court denied Waldau's motion.

Waldau timely appealed at the U.S. Court of Appeals for the District of Columbia Circuit. The government filed a motion for summary affirmance. Waldau opposed this motion and cross motioned for summary reversal or remand of record for trial. The Court of Appeals granted appellee's motion for summary affirmance, denying Waldau's motion. The panel later denied Waldau's petition for rehearing.

Summary of Lower Court Decision, Reasoning, and Omissions

The appeals court affirmed the district court's opinion "substantially for the reasons stated by the district court." App. *infra*, 2. The district court detailed the agency's allegations against Waldau, but failed to discusses any of the evidence proffered in Waldau's favor. Waldau raised the issue that his termination could have been improperly motivated to suppress an unpopular viewpoint on a matter of public concern. The court barred discovery and denied Waldau the opportunity for a fair trial (a bench trial was requested). App. *infra*, 14, 16.

The district court memorandum summarized the four-element inquiry required by the Supreme Court, but then omitted an analysis of the first, third and fourth elements. The court did not determine whether any part of Waldau's speech is a matter of public concern, or which parts are protected or unprotected. The court found that Waldau's speech failed the second "government interest" element because it "interfered with the operation of the enterprise." The court found Waldau "defied" instructions [not to speak], "used government property," caused "harm to the public of wrongly believing that the Postal Service endorsed [Waldau's] views" and "lied about his involvement," and concluded that "[t]he government's interest in terminating [Waldau], therefore, is strong." App., *infra*, 12.

The decision does not discuss whether protected speech was a contributing factor to the discharge, whether

the USPS harbored hostility towards competition and privatization proposals, whether the charges were untrue or based on false pretext, whether the USPS's true motivations were "tainted" with viewpoint discrimination, or whether the USPS would have levied the charges and reached the same decision if Waldau had not attempted to give the protected speech.

The decision does not properly allocate burden of proof as required in *Mt. Healthy City School Board v. Doyle*, 429 U.S. 274 (1977) or use the applicable test in federal employee speech cases which require a "careful balancing of the intensity of their [government officials] motive against gravity of the misconduct, [to determine whether] a nexus is established between the adverse action and the motive"[2] In other words, when government officials (who oppose the contents of a speech or become targets of an employee's disclosure) impose the severest punishment for minor technical infractions, a nexus is established between the improper motive to retaliate and the employee's termination. (herein called "Motive-Severity-Gravity, or MSG-nexus analysis")

In effect, the district court sustains all the agency's charges, refuses the employee fundamental due process needed to prove the charges are false or pretext, and then accepts the severest punishment without considering the agency's motives and fervent opposition to the content of the employee's speech. The court of appeals finds the parties' positions "so clear" as to warrant summary action in the government's favor, citing two cases which have nothing to do with the First Amendment (i.e., *Watchdog* and *Walker*). See, App., *infra*, 2.

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[2] See, *Stanek v. Dept. of Transportation*, 805 F.2d. 1572 (Fed. Cir. 1986); *Warren v. Dept. of Army*, 804 F.2d 654 (Fed. Cir. 1986); *Mingola v. U.S. Postal Service*, 33 MSPR 169 (1987) citing *Warren*.

VII. REASONS FOR GRANTING WRIT

Public employees are in the best position to ferret out waste, fraud, abuse, mismanagement, public safety hazards and recommend beneficial changes to increase government efficiency and improve service. This case presents the important question of whether federal employees have the right to participate in economic policy debate without prior restraint and censorship and without fear of the government employer invoking its employee regulations to punish expression.

Issue 1: Viewpoint Discrimination

This case presents the Supreme Court with a new question, the government's interest in prohibiting a public employee's viewpoint. The Court has considered prospective restrictions against speech, but has not considered action directed at suppressing a specific message from a specific employee.

Waldau, as an economist, could not agree with the official USPS view that competition and privatization were "unthinkable" or "detrimental" as expressed by the Postmaster General and Postal Board Chairman. Waldau felt compelled to speak out for these principles because he believed would bring more efficient and economical services to the American people. Postal Service regulations require that employees "seek to find and employ more efficient and economical ways of getting tasks accomplished." See, App., *infra*, 18.

The USPS treasurer learned of Waldau's speech and ordered Waldau not to give it because Postmaster General Frank did not want to debate the issue in the financial press. Waldau's director reiterated the order, threatened him with discharge, and ordered him to first obtain legal consultation. When Waldau tried to give the speech anyway, the speech was canceled by the treasurer, an investigation was launched and Waldau was discharged. The USPS alleged that Waldau "created false impressions," violated "channel" regulations,

disobeyed verbal orders to not give his speech, and failed to obtain USPS-provided legal advice concerning his speech. Waldau denied the charges.

The government, as an employer has an interest in promoting efficiency of the public services it performs, and may use that interest to justify imposing restraints on employees' speech. Such restraints would be unconstitutional if applied to the public at large. However, the government has no absolute right to prohibit speech, and its interest in efficiency in the workplace must be balanced against the interests of employees as citizens, to comment on matters of public concern, and the interest of the public may have in reading and hearing public employee's comments.

Supreme Court doctrine prohibits viewpoint discrimination in the marketplace of ideas. The First Amendment prohibits discrimination based on the message of the speaker.[3]

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[3] See, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L. Ed. 2d 772 (1984) ("[T]he first amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) ("the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's views.") *Niemotko v. Maryland*, 340 U.S. 268, 71 S.Ct. 328, 95 L. Ed. 280 (1951) (City cannot deny Jehovah's Witnesses permit to use a city park for bible talks when other religious and political groups had been allowed to use the park for similar purposes); *Fowler v. Rhode Island*, 345 U.S. 67, 73 S.Ct. 526, 97 L. Ed. 828 (1953) (same); *Student Coalition for Peace v. Lower Merion Sch. Dist.*, 776 F.2d 431, 437 (3rd Cir. 1985) ("Viewpoint discrimination... is impermissible regardless of the nature of the forum."); *Baugh v. Judicial Inquiry and Review Comm'n*, 907 F.2d 440, 17 Media L. Rep. 2092 (4th Cir. 1990) ("Viewpoint-neutrality is concerned with limitations on speech on the basis of the viewpoint expressed and 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.' "); *Amato v. Wilentz*, 753 F. Supp. 543, 553, 18 Media L. Rep. 1985 (D. N.J. 1990), where the court notes:

Invidious discrimination aimed deliberately at the suppression of particular ideas will constitute a *per-se* violation of the First Amendment. In *Rankin v. McPherson*, 483 U.S. 378, 384, the Court noted, while the government does have additional power to proscribe employee speech,

> [v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions, but simply because superiors disagree with the content of employee's speech.

The Postal Service ordered Waldau not to give his speech based on its knowledge of and opposition to the contents of his speech. Waldau provided enough direct and circumstantial evidence (statements, publications, documents, quotations) to establish that his speech was directed at improving postal quality and efficiency via increased competition and privatization. Postal officials opposed these views and ordered him not to give the speech. From these facts, considered in a light most favorable to Waldau, a reasonable inference could be made that the USPS's investigation, beliefs and charges would not be reasonable, and the action against Waldau would be tainted with improper motivation.

Waldau presented enough evidence to establish a reasonable inference that the government intended to punish the content of protected speech through coercive elimination of a particular viewpoint from within the USPS. The investigation and barrage of charges fired at Waldau were precipitated by

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> However, even in nonpublic forum the state cannot regulate protected speech on the basis of its viewpoint. "Viewpoint discrimination... is impermissible regardless of the nature of the forum." Indeed, the essence of the First Amendment is that the State cannot regulate speech "merely because public officials disapprove the speaker's views."

The per-se prohibition against viewpoint-discrimination is the backbone of the "neutrality principle."

the canceled speech. The charges all rely on the speech, and were the result of Postal Service hostility towards Waldau's viewpoint. The undisputed facts when viewed in a light most favorable to Waldau create a reasonable inference that Waldau's discharge was really viewpoint discrimination in the guise of employee regulation enforcement, and the charges against Waldau were false pretext.

The government makes no substantial showing that Waldau's speech caused disruption to Waldau's office, the Postal Service, or the public. As will be discussed below, government allegations of infractions to employee regulations (e.g., speaking outside of official channels, insubordination, use of government property) have been made in numerous free-speech cases, and rejected by the courts.

1A. Prior Restraint of Speech

After Waldau attempted his speech, the government charged Waldau with "creating an appearance of making a Postal Service decision outside official channels." Channel rules are often created to prospectively prohibit public employees from expressing viewpoints contrary to the government's position. The Supreme Court has recently outlined the appropriate test for determining the constitutionality under the First Amendment of prospective restrictions on employee speech. The Supreme Court in *United States v. National Treasury Employees Union*, 513 U.S. 454, 115 S.Ct. 1003 (1995), ("*NTEU*")[4] noted that the honoraria ban

> burdens speech far more than our past applications of *Pickering* because the ban deters an enormous quantity of speech before it is uttered, based only on

[4] A statutory restriction prohibited government employees from accepting an honoriam for making an appearance or speech. The Supreme Court found the ban in violation of the First Amendment.

> speculation that the speech may threaten the Government's interests.

Id. at 1013, n. 11.

> [U]nlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens... For these reasons, the government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.

Id. at 1014.

> The government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the government.

Id. (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736)

In the case at bar, the USPS prospectively banned Waldau's potential speech. Because of the lower court's adjudication of this case, Waldau was precluded from showing at trial that the government failed to meet its burden. In fact, Waldau would have shown that for his speech on how to improve USPS efficiency, the interests of both potential and audiences and the vast group of present and future employees in a broad range of future expressions are <u>not</u> outweighed by that expression's "necessary impact on the actual operation" of the USPS. Open debate on alternative ways of providing government services by employees providing those services has the potential of uncovering new ways which are superior to those currently used.

Recently, a court applied the *Pickering/ NTEU* balancing test. In *Harman v. City of New York*, 945 F.Supp.

750 (S.D.N.Y. 1996), citing *NTEU and Waters*,[5] the court held that executive orders requiring prior approval of contacts with media regarding policies or activities of Child Welfare Administration were unconstitutional insofar as they required prior approval of employee speech that was protected by the First Amendment. The court noted, "[t]his case is very different from the *post hoc Pickering* context where the speech has already occurred, and has already had its effect on the operation of the agency." Id. at 762. The court granted summary judgment to the suspended employees. Id. at 768.

In the case at bar, the district court upheld the government's orders prohibiting Waldau's speech by accepting the argument that the government would be harmed in having to "correct the public record and to explain the actions of wayward employees." See, App. *infra*, 11. This rationale is at odds with the Supreme Court's *NTEU* test. The government's rationale is also in conflict with the Supreme Court's prohibition on viewpoint discrimination and the speech "breathing space" rationale in *New York Times v. Sullivan*, 376 U.S. 254.[6]

With the courts of appeal in conflict, the Supreme Court needs to clarify the proper application of *Pickering/NTEU* and *New York Times*. Specifically, when the government learns that an unpopular viewpoint is about to be expressed, does it have a compelling interest to prohibit the speech so that it will not have to correct or rebut any information contained within the speech?

Supreme Court supervision is needed to ensure that unfettered employee debate on ways to improve government efficiency is protected, specific unpopular viewpoints on controversial issues may be expressed, and charges of diso-

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5 *Waters v. Churchill*, 114 S.Ct 1878 (1994)

6 The Supreme Court found newspaper entitled to breathing space when government official sued newspaper for libel because of published inaccuracies.

beying orders not to speak (or first obtain preauthorization) can not be sustained as insubordination. The power of Supreme Court supervision is needed to clarify how alleged infractions to these regulations should be analyzed in "dual motivation" cases.[7]

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[7] In *Anderson v. Central Point*, 554 FSupp. 600 (D. Or. 1982) aff'd, 746 F.2d 505 (9th Cir. 1984), the court found that school district channel rules which required advance notice to a superintendent of any direct message to the school board were impermissible prior restraint on speech in violation of the First Amendment. In *Southside Public Schools v. Hill*, 827 F.2d 270 (8th Cir. 1987), Arkansas school teachers were exercising protected rights of free speech under the First Amendment when they went outside the chain of command and wrote letters to the Board of Education. In *Borrell v. U.S. Inter. Communications Agency*, 682 F.2d 981, 991 (1982), the court rejected government arguments that employee whistleblower did not address her complaint to anyone in the "chain of command."; In *San Bernardino Public Employees Ass'n v. Stout*, 946 F.Supp. 790 (C.D.Cal. 1996) Child Support Division employees who sent letter to Board of Supervisors and newspaper criticizing management, received letters of reprimand charging misconduct. An Executive Order was subsequently issued limiting communications from employees. The court noted, "the executive Order on its face reveals no effort by defendants to strike a balance between District Attorney's Office's interest in efficiency and the employee's and public's competing First Amendment interests... The Executive Order thus does not exempt from its reach, (1) speech involving matters of public concern regardless of whether such speech is, in f[illegible]ikely to be disruptive to the government's mission as an employ[illegible]tations omitted), (2) speech which the government, as an emplo[illegible]absolutely no legitimate reason to restrict. Id. at 801. The court denied motion to dismiss First Amendment claim.; In *Andersen v. McCotter*, 100 F.3d 723 (10th Cir. 1996) an intern at Department of Corrections ("DoC") made an appearance on television criticizing DoC policy on release of sex offenders. DoC charged intern with violating policy prohibiting employees from speaking to media without prior authorization. The appeals court stated, "[the defendants] rely soley on statements contained in DoC's Code of Conduct and its community relations manual... it is the defendants burden to justify the challenged discharge on legitimate grounds... Accordingly, at this stage of the proceedings, the defendants are not entitled to summary judgment." Id at 728-9.; In *Westbrook v. Teton County School Dist.*, 918 F.Supp. 1475 (D.Wyo. 1996), a school district's staff-conduct policy, which limited and restricted criti-

Issue 2: Summary Judgment Without Trial

A procedural issue raised by this case is whether public employees have a right to counter government assertions of "reasonable investigation and belief" and establish government pretext and improper motivation. The question presented by this case is whether a U.S. district court's grant of summary judgment to the government and refusal to permit a trial (and court of appeals grant of summary affirmance) is in conflict with the Supreme Court's four-element inquiry[8] in mixed-speech, dual-motivation cases. If there exists a genuine issue of material fact, or a reasonable inference can be made that the government's investigation and beliefs would not be reasonable, or there exists a reasonable inference that the employee was really discharged to eliminate a particular viewpoint, should the employee be afforded the opportunity to engage in discovery and a trial?

The district court granted the government's motion for protection against discovery, and dismissed Waldau's complaint without a trial when Waldau requested a trial, and preserved the request. The court relied upon a sworn statement from a USPS official (Ms. Denny) as evidence of wrongdoing, not affording Waldau the opportunity to rebut the presumption of misconduct in a fairly conducted hearing. Without discovery, presentation of his case, and cross examination of the witnesses against him, many unknown and disputed facts remain. The government offered no statement (sworn or unsworn) from Inspector Sinnen who actually conducted the investigation against Waldau. Ms. Denny did not conduct the investigation herself. With a court ordered bar on discovery, Waldau has been afforded no opportunity to

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cism, was found to be facially overbroad and thus violative of First Amendment.

[8] See, App. *infra*, 8.

determine what was said, who was really responsible for his discharge and whether their motives were proper.

Supreme Court guidance is also needed to clarify how federal employee speech cases should be adjudicated. Federal employment law for many executive agencies requires discovery[9] and a trial when requested. To prevail, the employee must only show his speech was a "contributing factor,"[10] whereas a high degree of government proof (i.e., clear and convincing evidence) is required in cases alleging reprisal for whistleblowing. See, 5 CFR 1209.6-.7 App. *infra* 20-21. It is unclear whether the Supreme Court wants to modify these procedural safeguards for federal employees like Waldau. In the context of an adverse action against a public employee, the prohibition against reprisal under 5 U.S.C, Sec. 2302(b)(8) and the First Amendment right to free speech have been considered coexistive rights.[11]

This case presents an opportunity for the Supreme Court to consider and adopt the best of MSPB law and practice for the nation, for all public employee speech cases where speech is directed at improving government accountability and efficiency. The MSPB has developed considerable expertise in adjudicating these speech cases, under the watchful eye of the Congress.[12]

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[9] See, *Embree v. Dept. of Treasury*, 70 MSPR, 79, 86 (1996) ("Because we find that the appellant has made a non-frivolous allegation that she made protected disclosures... she may on remand and pursuant to the Board's regulations seek discovery of the Internal Affairs report and any other purportedly relevant and material documents in the agency's possession.")

[10] See, e.g., *Costin v. DHHS*, 72 MSPR 525, 539 (1996) ("fact that there is no 'smoking gun,' direct evidence of a retaliatory motive is not dispositive"); The agency is not given a presumption of good faith in a whistleblowing case.

[11] See, *Gerlach v. F.T.C.*, 8 MSPB 599, 9 MSPR 268 (1981).

[12] After extensive study of similar cases in the courts, the Congress enacted the Whistleblower Protection Act of 1989, to encourage disclosures, strengthen and improve protections, prevent reprisals against employees, eliminate wrongdoing within government, but not

Summary judgment for defendants should not have been ordered in this case. The case contained genuine issues of material fact, e.g., complex factual questions, credibility questions, disputed allegations of misconduct, counter allegations of viewpoint discrimination, intimidation and pretext. Summary judgment in Waldau's favor was the only possible dispositive court action given that Waldau was ordered to not give his speech containing an unpopular viewpoint on a controversial and politically charged policy issue opposed by postal officials, and the *de minimus* nature of the alleged misconduct. Regardless, a trial would have proved that the government's reasons for discharging Waldau were pretext to hide its real motive -- its hostility towards Waldau's message. This message spoke out for a change in economic policy, a change which postal managers opposed and wanted to suppress.

2A. Appeals Court Conflict in Adjudication of Mixed Speech Cases

This case raises the question of what categories of speech must be classified as protected, thereby requiring a complete analysis of the Supreme Court's four-element inquiry, and whether in cases containing a mixture of protected and unprotected speech, is it permissible for the court to not adjudicate the last two elements. The courts of appeal are in conflict.

The courts generally agree that certain subjects of speech are matters of sufficient public concern, where an employee's (and the public's) interest in hearing the speech outweighs the government's interest in proscribing the speech. These categories include speech exposing violation (by a government official) of any law, rule or regulation,

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protect an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action.

waste, fraud, abuse, gross mismanagement[13], speech directed at improving government efficiency or service, speech directed at stopping race, age or gender discrimination, sexual harassment. For these categories of expression, there is generally not a government interest which would outweigh the employees' and the public's interest in communicating and hearing the speech. Federal law sets forth specific subject matter which, at a minimum, must be considered protected. See, App. *infra*, 20, 5 USC 2302(b)(8).

Public employee speech on matters of government accountability and efficiency is speech on matters of public concern.[14] As the Court explained in *Connick*, the state's burden in justifying regulation varies according to the nature of the employee's expression. *Connick v. Myers*, 461 U.S. 138, at 150. A public employee's speech is constitutionally protected if it may be fairly considered to relate to "any matter of political, social, or other concern to the community." Id. at 146. The greater the component of comment on issues of public concern, the greater the showing the government must make that the comment is disruptive.[15]

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[13] In cases involving alleged "mismanagement," the MSPB has found that an employee's expression of views contrary to those of the Chairman of his agency on financial matters, upon which the employee had expertise, could be considered an allegation of mismanagement and abuse of discretion under Civil Service Reform Act. A communication may be protected if the agency viewed the employee as a whistleblower. See *Thompson v. Farm Credit Admin.*, 51 MSPR 569, 582 (1991).

[14] See, e.g., *Gillette v. Delmore*, 886 F.2d 1194 (9th Cir. 1989) [fireman's criticism of fire department action]; *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992, cert. denied, 113 S.Ct 2337 (1993) [juvenile hall volunteer's memorandum critical of juvenile hall management sent to judges and governing agencies]; *Burgess v. Pierce County*, 918 F.2d 104, 106 (9th Cir. 1990) (per curiam) [fire marshall's opposition to county ordinance]; *Allen v. Scribner*, 812 F.2d 426, 431 (9th Cir.), amended, 828 F.2d 1445 (9th Cir. 1987) [a state entomologist's public criticism of state's medfly infestation project].

[15] See, *Thomas v. Carpenter*, 881 F.2d 828, 830-31 (9th Cir. 1989), cert denied, 494 U.S. 1028, (1990) (holding that sheriff's deputy could not be penalized for statements made during an election in which

Waldau's speech supporting postal competition and privatization was a matter of public concern because the speech recommended the most efficient industry structure for provisioning postal services to the American people. These issues are often debated in the Congress, and the price and quality of postal services are of interest to the public. Waldau expressed an unpopular (within the USPS) viewpoint on a controversial and politically charged subject.

In cases where one of the above categories of expression are implicated, the Supreme Court has required an inquiry into the third and fourth elements of the four-element inquiry, i.e., was the speech a substantial, contributing or motivating factor in the employer's action, and whether the government would have taken the same action absent the protected speech?

Protected and unprotected speech may be intertwined or may co-exist as separate incidents ("mixed speech cases"). As show in the cases below, the courts of appeal (e.g., 7th and 10th Circuits) are in conflict on whether an inquiry must be made into the last two elements in mixed speech cases.

In *Waters* the Supreme Court noted management "sensitivity" to the employee's criticisms, and although it found the employee's speech partly "disruptive" (impeding the transfer of another nurse) the Court still remanded the case for analysis of the "non-disruptive statements" (criticism of nurse cross-training policy), possible management "hostility" and the "actual motivations" of management.[16] The Supreme Court stated, "The district court erred in granting petitioners [employer] summary judgment."[17]

In *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996), the court ruled that material issues of fact existed as to whether a college president was motivated to suspend a

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he challenged the incumbent sheriff, noting that the more the speech at issue is on matters of public concern, the more the government must demonstrate genuine disruption).

16 *Waters* at 1891.

17 *Waters* at 1881.

teacher because the teacher had exercised her First Amendment right to free speech criticizing a reduction-in-force plan. This precluded summary judgment for the president, despite allegations of insubordination, violation of policies, and interference with orderly administration. The court stated, "Thus, the district court must tell the jury which incidents of expression deserve First Amendment protection to enable the jury to apply the third and fourth steps of *Pickering/Connick* analysis to Gardetto's legally protected expression." Id. at 817.

In *Jefferson v. Ambroz*, 90 F.3d 1291 (7th Cir. 1996), a probation officer identified himself as a local gang member on a radio call-in program and severely criticized the local police department and court system. He was terminated on charges of misrepresentation, tardiness, lying, damaging the department's reputation and work relationships. The court, citing *Waters*, conceded the speech was on a matter of public concern, and although the actual content of the speech was in dispute, stated "the court need only know the gist of what the employee said, not the precise words he used to express himself." Id. at 1296-7. The dismissal of Jefferson's First Amendment claim was affirmed without trial, even though Jefferson claimed, "he could have proven other facts at trial that would have given rise to a valid First Amendment claim." Id. at 1298. In a concurring opinion, Judge Rovner stated, "I nevertheless write separately to underscore my view that proper application of the *Pickering-Connick* balancing test to speech that is conceded to be on a matter of public concern would, as a general matter, require a more fully developed factual record." Id.

The decision in the case at bar appears to be in conflict with established Supreme Court precedent requiring a complete 4-element inquiry in mixed speech cases, as to which the courts of appeal appear to be in conflict. (See above.) The vast majority of Waldau's comments were on matters of public concern and could not be considered disruptive according to the existing body of Supreme Court case

law. Waldau made no statements criticizing his superiors[18] or agency or threatening co-workers, no statements directed at impeding work or exhibiting rudeness to customers, no statements using profanity or vulgarity.

The case at bar may be considered a mixed speech case because the government appears to allege several new categories of unprotected or disruptive speech, i.e., misidentification of speaker, what was said (or not said) in setting up the speech, and the juxtaposition of public symbols (postal logos) within speech. The district court erred by granting summary judgment before deciding whether there was any protected speech, and without conducting an inquiry into the third and fourth elements, using a "MSG-nexus" analysis as required in federal employment cases. The lower court decision contains no discussion, and apparently no consideration of USPS's opposition to competition and privatization, and improper motivation to eliminate that unpopular viewpoint from within the USPS.

2B. Need for Supreme Court Clarification of Factual Basis for "Reasonable Belief"

This case also presents a question of the factual basis for applying the *Pickering/Connick* test, i.e., what the employee actually said, and what the employer reasonably believed was said. The factual basis was considered by the Supreme Court in *Waters*. The Supreme Court outlined what must be condemned as unreasonable[19], "pretext" action based

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18 See, e.g., *Oliver v. DHHS*, 34 MSPR 465 (1987), the MSPB found protected speech intertwined with intemperate, abusive statements directed at the employee's superiors. The MSPB analyzed the fourth element, and stated, "we must determine if the agency would have proceeded with the adverse action, absent the retaliatory motive which we have inferred... We conclude, for the following reasons, that protecting the appellant's diatribe would not further the purpose of the law." Id. at 472-75.

19 *Waters* at 1881.

on "extremely weak evidence when strong evidence is available"[20] and stated, "the public employer must not only reasonably investigate the third-party report, but also believe it."[21] The Court considered past cases and stated, "In none of them did we have occasion to decide what should happen if the defendants [employer] hold an erroneous and unreasonable belief about what plaintiff [employee] said."[22]

The case at bar provides this occasion, because it involves a third-party report written by a Postal Inspector, where the contents of the report do not support the allegations of misrepresentation, and the allegations on their face strain credulity. This case also presents a question of symmetrical, equal protection under the law which requires clarification. If an employee reasonably believed that his speech was accurate, the audience understood his intent, and that he was authorized to use office resources on privatization issues, is he entitled to speech "breathing space" and "reasonable belief" in the eyes of the law?

Under *Waters*, it is not what is *actually* said by the employee, but what the government manager *reasonably believed* was said. The Supreme Court needs to clarify what its *Waters* decision was meant to accomplish. Was it (1) to give the govement the benefit of reasonable belief when based on reasonable investigation, or was it (2) to provide greater deference to government decision making, and obviate the need for trials. Clarification is needed because, in *Waters*, hearsay evidence[23] is discussed in the context of supporting the government's case (i.e., government's "reasonable belief"). The Court does not mention whether the same hearsay evidence would be reasonable to support the employee's case or reasonable belief. If *Waters* was meant to extend reasonable be-

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20 *Waters* at 1889.

21 *Waters* at 1891 (Justice Souter concurring)

22 Waters at 1889

23 See, *Waters* at 1888.

lief for both parties, with certain safeguards, then this intention still needs to be explicated.

This case provides the first test of the Supreme Court's new *Waters* "reasonable investigation and belief" standard, here applied to an alleged inaccuracy or misunderstanding of the intent of the speaker. The new question of law is whether the employee is also entitled to "reasonable belief" under *Waters*. In the case at bar, the question of fact is whose "reasonable belief" was more reasonable, the government's or the employee's.

There is ample evidence that Waldau did truthfully and clearly state that his speech was "unofficial and informal" and "opposed" as corroborated by Inspector Sinnen, who conducted the investigation against Waldau. Before the speech, one banker asked the USPS treasurer for information about Waldau's identity and whether there was a relationship between the speech and a Request For Proposal, instead of asking Waldau directly. It appears that one of the banker invitees (out of five), may have thought the USPS had permitted the speech to proceed despite official opposition. Waldau reasonably believed his speech was accurate and there would be no misunderstanding of his intent, as there was a long public record of USPS opposition to privatization, no Congressional mandate authorizing privatization, and world-wide controversy surrounding privatization. Waldau tried to avoid and clear up any misunderstanding prior to the time he was to give the speech, and never had an opportunity to give his speech during which he could have corrected any remaining misunderstanding. See, App., *infra*, 30-38.

In contrast, the USPS's beliefs appear unreasonable. The USPS asserts Waldau's speech was "on behalf of the Postal Service." First, it strains credulity for the USPS to believe that sophisticated investment bankers would think the USPS was seeking to become privatized, without the USPS Chief Financial Officer or treasurer setting up or attending the meeting. Second, Ms. Denny (Waldau's director) did not herself call the bankers for clarification when the investigative

memorandum contained conflicting, and inclusive evidence. It appears that neither Inspector Sinnen or Denny asked the bankers the direct, unambiguous question of whether they thought Waldau was speaking officially on behalf of the Postal Service seeking to be privatized, or unofficially as an employee expressing his own views. From the ambiguous statements of the bankers, it appears this question was never asked. The USPS's insinuation of deliberate misrepresentation is extreme and unsupported given the sworn statements of the investment bankers and the survey cover letter which states "viewpoints of some economists." If the USPS had reasonably investigated with a follow-up question, the disputed fact of Waldau's intent would have been resolved in Waldau's favor. In sum, it was unreasonable for USPS to draw its conclusions from the facts before it, when better evidence was at its fingertips and left untouched. This raises the specter of pretext.

The district court's finding that Waldau caused, "harm to the public of wrongly believing that the Postal Service endorsed [Waldau's] views" is also strained and appears to go beyond the Supreme Court's "reasonable belief" standard announced in *Waters*. In effect, the district court uses *Waters* as a reverse application of the free speech "breathing space" rationale used in *New York Times v. Sullivan*. The Supreme Court adopted the same "breathing space" principle in *Pickering*, and dismissed allegations of inaccurate information, stating, "[t]he Board could have easily rebutted appellant's [teacher's] errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise."[24]

The same principle should be applied here. Permitting the government to punish misunderstandings of speech would chill free speech. Without "breathing space," the government could easily punish unpopular speech. The Supreme Court must clarify the proper application of *Waters* and *New York*

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[24] *Pickering v. Board of Education*, 391 U.S. 563, 569, 572 (1968).

Times when speech involves a matter of public concern and there may be an unintentional misunderstanding on the part of the audience.

A Supreme Court application of *New York Times* to public employee speech would prevent the chilling effect that may result if the government is permitted to discharge employees for allegedly misrepresenting the government's official position. Public employees should be afforded the same protection from these types of allegations as afforded the press in libel suits, and not be held to a higher standard than the press.

2C. Appeals Court Conflict in Treatment of Infractions to Employee Regulations

This case also presents the following question: Under what circumstances is the government's enforcement of employee regulations necessary to maintain legitimate interests and at what point does it become a violation of the First Amendment? In the case at bar, a public employee was discharged following *de minimus* use of public resources and public symbols to express an unpopular viewpoint on a matter of public concern, when similar resources were being used by the agency to express an alternative viewpoint. The question is whether the regulations were being invoked as a pretext to punish an unpopular viewpoint in violation of the First Amendment.

Waldau used the USPS letterhead in his survey, the postal eagle logo in his presentation, and his office computer and supplies to write the speech. The government charges Waldau with the unauthorized use of postal resources, because allegedly Waldau had no duties relative to privatization. Waldau denies the charges as pretext for viewpoint discrimination. Waldau asserts he was a research and analysis professional, that he did have official duties relative to privatization, that he was authorized to use office resources, and that

he reasonably believed the *de minimus* amount of use was consistent with routine office practice.

Freedom of speech encompasses communication through symbols. Nondisruptive symbolic speech is protected. See, e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 Regulation of symbolic speech based on viewpoint will generally not be difficult to identify, and will run afoul of the First Amendment's heavy presumption against viewpoint discrimination. In *Schacht v. United States*, 398 U.S. 58 (1970), a participant in an antiwar skit was prosecuted under a statute that prohibited wearing an Army uniform without authorization. The statute contained an exemption allowing the uniform to be worn in a theatrical performance "if the portrayal does not tend to discredit" the armed forces. Justice Black, speaking for the Court, found it unnecessary to cite any authority or offer any explanation for holding that the statutory exception, "which leaves Americans free to praise the war in Vietnam but send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment." There is a sense in which we have always known that "unless we protect [freedom of speech] for all, we will have it for none."[25]

In the case at bar, Waldau was unaware of any regulations (or broad interpretations) prohibiting the use of postal resources, logo or letterhead in public debate. Waldau saw these being used by the USPS in the production of videos and publications containing messages opposing competition and privatization. No one was punished for these uses. Waldau's use of the postal logo in a respectful, nondesecrating manner contained the simple symbolic message that there was at least one employee within the Postal Service who supported the American ideals of competitive free markets and private enterprise, contrary to the official USPS position. The Supreme Court should determine whether a regulation which leaves postal employees free to use the postal logo in communica-

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[25] See also, *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

tions opposing competition and privatization, but then discharges employees like Waldau for using the symbol in communications supporting competition, can survive in a country which has the First Amendment.

Another alleged infraction is Waldau's use of *de minimus* office resources in preparing his speech. Much of the public debate over public funding of speech is thus finally reduced to what is meant by the term "viewpoint discrimination." In *American Council of the Blind v. Boorstin*,[26] for example, the court held that it was unconstitutional for the Library of Congress acting in apparent acquiescence to the wishes of Congress, to cease producing copies of *Playboy* magazine in Braille. The court found that the library had eliminated *Playboy* from its Braille program solely because of the sexual orientation of the magazine. "Although individuals have no right to a government subsidy or benefit, once one is conferred, as it is here through the allocation of funds for the program, the government cannot deny it on a basis that impinges on freedom of speech,"[27] the court stated. To eliminate *Playboy* solely because of its sexual orientation, the court ruled, was "viewpoint discrimination," and therefore unconstitutional.

In the case at bar, the question is whether once the right to use office resources is conferred on a public professional employee like Waldau, can it be deemed "illegal" and harshly punished without prior warning or instruction, just because the public employer disagrees with the employee's views? The USPS did not cite any regulation which expressly prohibited the use of the USPS logo or office resources in public debate related to the postal policy.[28] It is uncontested

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26 *American Council for the Blind v. Boorstin*, 644 F. Supp. 81, 13 Media L. Rep. 1537 (D.D.C. 1986)

27 Id. at 815.

28 *Cf. Jurgensen v. Fairfax County*, 745 F.2d 868, 883 [employee release of report to press violated departmental regulations which were "not obscure, nor are they vague or overbroad... and he was sufficiently

here that the USPS had the absolute right to prohibit any continued expenditure of office resources on privatization speech on a forward-going basis if it wanted to. The issue presented here is whether the government can look back and retroactively second-guess routine office practices after an unpopular speech. Deference to the government would chill free speech, as many public employees would be vulnerable to these allegations.

In public employee speech cases, a charge of "misuse" of resources can only be reasonably sustained where the employee continues use despite repeated prior warnings. In *Stanek v. Dept. of Transp.*, 805 F.2d 1572 (Fed. Cir. 1986), the employee wrote and solicited direct comments on agency programs from persons affected by agency operations, setting up a private clearinghouse for state highway funds, which directly competed in function with an existing government program. The MSPB found that Stanek's "Paradox paper" was a protected disclosure and that because the paper was the basis for two of the charges on which he was removed, Stanek established the existence of a causal connection between his disclosure and his removal. However, in analyzing the fourth element, the court found Stanek ignored various warnings and reprimands by his superiors regarding the unauthorized activities (misuse of property, solicitation of a personal loan), and concluded any additional reprimand or suspension would be insufficient to deter Stanek from repeating his conduct. His removal was sustained. Id. at 1580.

Waldau passes the 3-prong *Stanek* test because his use of resource was: (1) not for personal gain, (2) not competing with any functions of the USPS, but merely expressing a viewpoint, and (3) not repeated after reprimand. After the canceled speech, Waldau asked whether his use of resources was considered improper. His supervisor replied, "I don't know. We'll see." When Waldau later learned that his use

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familiar with the regulations to know his action in releasing the report was in violation thereof."]

was considered "illegal," he apologized and offered to pay for the resources. The offer was rebuffed. App. *infra*, 38-39 As Waldau received no prior warning, no reprimand, and offered to correct any misunderstanding, discipline was totally unnecessary to deter repeated conduct under *Stanek*.

As Waldau had eleven years of exceptional service and no prior disciplinary record, the penalty of removal was grossly disproportionate. Under U.S. Merit Systems Protection Board (MSPB) case law, reprisal can be inferred by protected activity closely followed by discipline based on false reasons or grossly disproportionate to the circumstances. See, *Special Counsel v. McDonald*, 42 MSPR 624 (1989). In *Gerlach v. F.T.C.*, 9 MSPR, 268 (1981) [employee filed a grievance], citing *Mt. Healthy*, [29] the MSPB observed that the agency failed to use progressive discipline for minor deficiencies, and the discipline of removal far outweighed the actionable conduct. In *Spadaro v. Dept. of Interior*, 18 MSPR 462 (1983), the employee made an appearance

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[29] In *Mt. Healthy City School Board v. Doyle*, 429 U.S. 274 (1977) the Supreme Court heard a challenge to the right of a teacher to express his views. Beginning in 1970, Fred Doyle, an untenured teacher in Mt. Healthy, Ohio, became involved in a series of incidents -- he argued with another teacher until the teacher slapped him, he disputed with employees of the school cafeteria over the amount of spaghetti he had received, he referred to students as "sons of bitches," and he made a obscene gesture to two girls who disobeyed him. Also, Doyle telephoned a Cincinnati radio station to report that his principal had established a dress and appearance code for teachers. The station reported the information as a news item. At the spring meeting of the board of education, Doyle's contract was not renewed because of "a notable lack of tact in handling professional matters." All of the above instances were cited. Doyle initiated court action, seeking reinstatement. The Supreme Court held unanimously that Doyle's telephone call to the radio station was protected by the First Amendment. Because it played a "substantial part" in the decision not to rehire Doyle, he was entitled to reinstatement with back pay. The Court pointed out that the district court had erred when it failed to determine whether the board would have reached the same decision, even in the absence of the telephone call. With such a determination, the decision not to rehire Doyle could have been upheld.

and comments on a television program. He was suspended for thirty days on charges of insubordination and unauthorized use of a government telephone. The MSPB reversed the agency's action, "even though charges of insubordination and unauthorized use of a government telephone were sustained, since charges, even when viewed accumulatively, were minor technical infractions..."

Under the MSPB's interpretation of *Mt. Healthy*, the test is not what punishment the agency could have imposed, but whether it would have imposed the same punishment on the particular employee under the circumstances, absent an improper motive. Without evidence that the agency would have acted against the employee, a dual-motivation penalty will not be sustained. In *Ireland v. SSA*, 34 MSPR 614 (1987), [employee involved in union organizing] the MSPB found "a causal connection between the protected activity and adverse action, and that the protected activity was a significant factor in the decision to remove the appellant." The Board found the agency's charges could not be sustained or were "pretextual... or were *de minimus* in nature." Id. at 619-24.

In the case at bar, the district court did not apply the required *Mt. Healthy* test, or consider the government's motives, or the reasonableness of the penalty absent any prior disciplinary problems. The USPS did not apply progressive disciplinary measures to deter what it considered to be objectionable conduct. In an "MSG-nexus" analysis, reprisal may be inferred because the harsh penalty imposed was grossly disproportionate, amounting to economic capital punishment.

Why This Case is Important

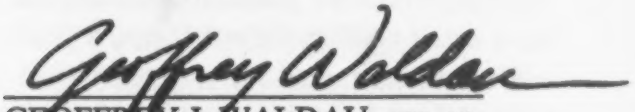
This case provides an opportunity for the Supreme Court to clarify and extend its *Mt. Healthy*, *Waters* and *NTEU* decisions and resolve a conflict in the courts of appeal. It would be helpful to the 18 million public employees in federal, state and local governments to know what is permissible

when speaking out on matters of government efficiency and accountability. The issues presented in this case call for another landmark decision on public employee speech rights, in the *Pickering* line of cases, to bring this line full circle.

VIII. Conclusion

Petitioner respectfully requests that the Supreme Court grant this petition for writ of certiorari.

Respectfully submitted,



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APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MANDATE
Pursuant to FRAP 41(a)
11-14-97
BY: E. Brown,
Deputy Clerk

No. 97-5162

GEOFFREY WALDAU
Appellant

September Term, 1997
95cv01151

v.

MICHAEL S. COUGHLIN, et al.
Appellees

Filed SEP 25 1997
Clerk,
U.S. Court of Appeals
District of Columbia
Circuit

BEFORE: Wald, Silberman, and Randolph, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply; the motion for summary reversal and the opposition thereto; and the motion to exceed page limits, it is

ORDERED that the motion to exceed page limits be dismissed as moot. The motion was within the permissible limits. See D.C. Cir. rule 27(c). It is

FURTHER ORDERED that the motion for summary reversal be denied and the motion for summary affirmance be granted substantially for the reasons stated by the district court in its order filed April 1, 1997. Waldau failed to offer any evidence from which a reasonable factfinder could have determined that his right to express his views to the public outweighed the Postal Service's obligation to effectively and efficiently provide services to the public. See Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk

Per Curiam

s/ PW
LHS
ARR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEOFFREY WALDAU Plaintiff	)	
v.	)	Civil Action No. 95-1151-LFO
MICHAEL S. COUGHLIN, et al. Defendants	)	Filed APR - 1 1997 Clerk, U.S. District Court District of Columbia

ORDER

For reasons stated in an accompanying Memorandum, it is this 27th day of March 1997 hereby

ORDERED: that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED: that defendants' motion for summary judgment is GRANTED; and it is further

ORDERED: that the complaint is DISMISSED.

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEOFFREY WALDAU Plaintiff	)	
	)	Civil Action No.
v.	)	95-1151-LFO
MICHAEL S. COUGHLIN, et al. Defendants	)	Filed APR - 1 1997 Clerk, U.S. District Court District of Columbia

MEMORANDUM

Plaintiff filed suit alleging that he was terminated from his employment at the United States Postal service in violation of his First Amendment rights. A June 3, 1996 Memorandum and Order dismissed plaintiff's claims for money damages and held that plaintiff's claims for equitable relief were not time-barred. The parties cross-moved for summary judgment. An accompanying order grants defendants' motion for summary judgment.

I.

Plaintiff Geoffrey Waldau was employed by the United States Postal service from 1979 until his termination on September 17, 1990. In June or July 1990, plaintiff arranged to speak to members of five New York investment banks concerning privatization of the Postal Service. Plaintiff concedes that the Postal Service was not considering privatization. Waldau Dec. ¶ 2. Prior to delivery of the speech, one of the bankers informed Stephen Kearney, Treasurer of the Postal Service, of plaintiff's intention to deliver this address. On July 5, 1990, Treasurer Kearney ordered plaintiff not to give the speech. On July 6, 1990, Michele Denny, plaintiff's director, also ordered plaintiff not to give the speech. Ms. Denny told plaintiff to consult with the Postal

Service's General Counsel's office concerning how plaintiff could pursue this personal project without jeopardizing himself or the Postal Service. Plaintiff canceled the speech but then rescheduled it for July 1990. On July 9, 1990 plaintiff took annual leave and traveled, at his expense, to New York City to deliver the speech. On July 11, 1990, plaintiff showed up at the appointed time and place to deliver the speech, only to learn that Treasurer Kearney had canceled it.

On July 13, 1990, following up on the cancellation, Ms. Denny met with plaintiff and his immediate supervisor, Lisbeth Dobbins. Plaintiff told Denny and Dobbins that "he was acting on his own and that the privatization issue was his personal interest." Denny Decl. ¶ 5. Ms. Denny also stated that plaintiff said that he "represented himself as a senior economist with the Postal Service" to the bankers. Id. At the time of his removal, plaintiff was an Operations Performance Analyst. Id. ¶ 11. Plaintiff gave his superiors a copy of the speech he had planned to give on July 11. The presentation included fifty overhead transparencies that plaintiff concedes had been prepared with Postal Service equipment and supplies and on government time. Many of the transparencies included the logo of the Postal service. Id. ¶ 7.

Plaintiff's supervisors also learned at the July 13, 1990 meeting that plaintiff had conducted a survey in approximately March 1990 soliciting the public's views on restructuring the Postal Service. Id. ¶ 6. The survey included a March 1, 1990 letter addressed to "Postal Customer" on Postal Service letterhead and signed by "Geoff Waldau, Senior Economist." The survey asked participants ten questions. Plaintiff gave each survey participant a pre-addressed, prepaid Postal Service envelope to return the survey. Plaintiff prepared the survey at work and at home. Plaintiff told his superiors that he had handed out fifty of these surveys to people at airports. Thirty-five were returned. Id.

In response, Waldau's superiors placed him on administrative leave, and on August 16, 1990, Ms. Dobbins gave him "Notice of Proposed Termination" no sooner than 30

days thereafter. Def. Exh. 8. The Notice charged: (1) unauthorized representation of the Postal Service in connection with the survey and the aborted July 11, 1990 speech; (2) use of Postal Service property for unofficial activities; (3) disobeying instructions of a supervisor by failing to cancel the July 11 speech as directed; and (4) disobeying instructions of a supervisor by failing to meet with the Postal Service's General Counsel's office, as directed. Def. Ex. 3. The Notice concluded with an invitation for Waldau and/or his representative to review the "material relied on to support the reasons" for the Notice, and to answer within 10 days.

Plaintiff answered the charges on August 20, 1990. He stated that he had "no intention of misrepresenting the Postal Service's 'official' position on privatization nor financially obligating the Postal Service." Def. Exh. 7. He also stated that he "tried to make this clear to the investment bankers by stating that the meeting was unofficial, informal confidential [and] had nothing to do with the RFP on issuing debt." He explained that he was engaged in "skunk works" or a type of "unauthorized research" that he read about in a book entitled In Search of Excellence. He stated: "I was trying to be the Postal Service's restructuring champion because I think the Postal Service would benefit from it enormously." Id.

In a four-page, single space letter dated August 29, 1990 terminating Waldau's employment, Ms. Denny found "that the charges, as stated in the notice of August 16, 1990, are fully supported by the evidence and warrant your removal." Id. at 1. She asserted that she had given "full consideration" of plaintiff's "written answer of August 20, 1990, and all other evidence of record." Id. The letter stated that the evidence in support of each charge, alone, was sufficient to justify dismissal.

On Charge 1, Ms. Denny determined that although plaintiff stated that he did not intend to misrepresent the Postal Service's views before and during the aborted July 11, 1990 speech, the transparencies he prepared for the speech

displayed the Postal Services logo throughout the presentation, "thereby creating the impression that [they] had been prepared by the Postal Service and expressed the views of the Postal Service." Id. at 1. "In addition, individuals representing the investment firms told Postal Inspector Sinnen that you represented to them that you were speaking on behalf of the Postal Service," Id. Ms. Denny also stated that the "Postal Service did not give you authority to pursue this issue or to make any representations on behalf of the Postal Service, nor is any work in this area encompassed by your present job responsibilities." Id. at 2. "In fact, the mission of our office has absolutely nothing to do with privatization. By engaging in these activities, you created the false impression that the Postal Service had decided to pursue the privatization issue." Id.

On charge 2, Ms. Denny found that plaintiff used government materials for unauthorized activities in disseminating the privatization surveys. Ms. Denny found that plaintiff's offer to reimburse the Postal Service would not compensate it for the "intangible losses associated with the illegal use of its property." Id. at 2. Ms. Denny noted that the integrity of the Postal Service's rules and regulations was "weakened by the type of activity in which you have engaged." Id.

On charge 3, Ms. Denny determined that plaintiff had disobeyed her and Treasurer Kearney's separate instructions to cancel the July 11, 1990 meeting and that plaintiff's "disobedience [was] willful and inexcusable, especially in light of the fact that [he] deliberately lied to [her] and to Mr. Kearney when [he was] questioned about he meeting." Ms. Denny also found that plaintiff was "deceptive in [his] attempts to hold the meeting, despite instructions not to." Id. at 2-3 On Charge 4, Ms Denny found that plaintiff had failed to meet with Charles D. Hawley, the Assistant General Counsel, concerning possible conflict of interest and misrepresentation concerning plaintiff's pursuit of privatization. Id. at 3.

Finally, Ms. Denny identified several instances in which plaintiff had allegedly persisted in "pursuing the privatization issue within the Postal Service" after plaintiff had been placed on administrative leave. Plaintiff, for instance, wanted to return to work to make "several presentations to Postal employees on privatization." Id. Thus, according to Ms. Denny, plaintiff had "no intention of ceasing these unauthorized activities." Id.

Ms. Denny concluded that plaintiff's conduct had been "detrimental" to the "efficiency" of the Postal Service. Id. "You have demonstrated that you cannot be trusted to perform your job as directed. I also question your ability to use good judgment, and I find it difficult to believe that you would obey my instructions and cease your unauthorized activities if you were to return to work." Id. at 3-4.

II.

A.

The public employee's First Amendment cause of action has four elements. See Tao v. Freeh, 27 F.3d 635 (D.C. Cir. 1994); Hall v. Ford, 856 F.2d 255, 258 (D.C. Cir. 1988). First, the public employee must have been speaking on a matter of public concern. See Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996). Second, the court must balance the interest of the employee "as a citizen, in commenting on matters of public concern" and the interest of the employer "in promoting the efficiency of the public service it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). Only where the employee's speech touches on a matter of public concern, and only where the employee's First Amendment interest is not outweighed by any disruption that the speech may cause to the efficiency of the public enterprise, is that speech constitutionally protected. Id. at 572-73. Third, the employee must prove that her speech was a substantial or motivating factor in the denial of the benefit that she sought. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Finally, the government must be given an opportu-

nity to prove that it would have reached the same decision even absent the protected conduct. Id. The first two factors under the Pickering test are questions of law for the court to resolve, while the latter are questions of fact ordinarily for the jury. Tao, 27 F.3d at 638; Hall, 856 F.2d at 258.

B.

The speech for which plaintiff was terminated is not constitutionally protected because the Postal Service's interest "in promoting the efficiency of the public services it performs through its employees" outweighs plaintiff's "interest as a citizen, in commenting upon matters of public concern." It is, therefor, not necessary to determine whether the speech was a matter of public concern. It is also not necessary for a jury to determine whether the speech was a substantial or motivating factor in plaintiff's termination or whether the Postal Service could prove that it would have reached the same decision, even absent the protected conduct.

Where there are disputes as to the "factual basis for applying" the Pickering balancing test, the court must "look to the facts as the government employer reasonably found them to be." Waters v. Churchill, 114 S.Ct. 1878, 1884, 1889-90 (1994). Waters rejected the idea that balancing test should be applied to the facts as determined by the judicial fact finder. That approach, the court held, "would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court." Id. at 1888. Such an approach is untenable because it would require a government manager "to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw." Id. In the instant case, the government made contemporaneous, written findings concerning the harm of plaintiff's speech. See Def. Exh. 3 & 8. Such findings were made after a reasonable inquiry of the charges, notice to the plaintiff of the charges, and consideration of plaintiff's responses to the charges. In applying the Pickering balancing test, this Memorandum relies upon the govern-

ment's findings in terminating plaintiff because those findings are objectively reasonable and made in good faith after an appropriate consideration of the several charges. Waters, 114 S.Ct. at 1889.

Rankin v. McPherson, 483 U.S. 378 (1987), established the factors to be considered in weighing the Pickering balancing test:

> In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.

Id. at 388 (internal quotations omitted).

First, consideration of the "time, place, and manner" of the speech at issue supports the conclusion that the speech "interfere[d] with the regular operation of the enterprise." Rankin, 483 U.S. at 388. Ms. Denny found that plaintiff misrepresented the Postal Service by telling the New York bankers that he would be speaking on its behalf. Def. Exh. 8. She also found the plaintiff misrepresented himself and the Postal Service by disseminating the survey on Postal Service letter-

head and identifying himself as a "senior economist." At the time of his removal, plaintiff was an Operations Performance Analyst. Ms. Denny demonstrated that the Postal Service had been harmed by these misrepresentations because it "created the false impression that the Postal Service had decided to pursue the privatization issue." Id. Defendants argue that to retain an employee who engages in such speech would require the Postal Service to expend considerable resources "to correct the public record and to explain the actions of wayward employees." Opp. at 8. Indeed, false statements by a plaintiff are weighed against his interest in the Pickering balancing test where such allegations are "so related to day-to-day operations of the [agency] that any harmful impact on the public would be difficult to counter because of the employee's presumed greater access to the real facts." Pickering, 391 U.S. at 572.

Second, Ms. Denny also determined that plaintiff's conduct "impair[ed] discipline by superiors or harmony among co-workers." Rankin, 483 U.S. at 388. A government employer is not required to "tolerate action which he reasonably believed would disrupt the office, undermine authority, and destroy close working relationships." Connick v. Myers, 461 U.S. 138, 154 (1983). Ms. Denny reasonably found in this case that plaintiff did engage in conduct that would undermine authority and damage working relationships. On charge 3, Ms. Denny determined that plaintiff had disobeyed separate instructions from herself and Treasurer Kearney to cancel the July 11, 1990 meeting. She found plaintiff's "disobedience willful and inexcusable, especially in light of the fact that [he] deliberately lied to [her] and to Mr. Kearney when [he was] questioned about the meeting." Def. Exh. 8 at 2. Ms. Denny also found that plaintiff was "deceptive in [his] attempts to hold the meeting, despite instructions not to [do so]." Id. at 2-3. On Charge 4, she found that plaintiff had disobeyed instructions by failing to meet with Charles D. Hawley, the Assistant General Counsel, concerning possible conflict of interest and misrepresentation

concerning plaintiff's speech and survey. Id. at 3. Ms. Denny concluded that plaintiff's conduct had been "detrimental" to the "efficiency" of the Postal Service. Id.

Third, Ms. Denny determined that plaintiff's unauthorized use of government property also harmed the Postal Service. Plaintiff used his telephone, computer, and overhead transparencies to prepare an unauthorized survey and speech. Id. at 2. Ms. Denny found that this violation of Postal regulations caused tangible and intangible harm to the Postal Service. Ms. Denny noted, for example, that the integrity of the Postal Service's rules and regulations was "weakened by the type of activity in which you have engaged." Id.

Fourth, plaintiff's preparation of the survey and the speech on government time "impeded the performance of [plaintiff's] duties. Rankin, 483 U.S. at 388. Ms. Denny determined that plaintiff was not authorized to conduct these activities. Def. Exh. 8 at 1-2. Thus, plaintiff's preparation of the survey and speech on government time detracted from his ability to perform the duties he was required to perform

In sum, Ms. Denny, on the Postal Service's behalf, reasonably determined that plaintiff willfully defied the instructions of two supervisors, misrepresented Postal Service's views to the public, used government resources for unauthorized means, engaged in unauthorized projects on government time, and lied to his supervisors about his involvement in these efforts. Ms. Denny has determined that his speech has caused actual harm to the Postal Service. The government's interest in terminating plaintiff, therefore, is strong. In Waters, the Court reasserted the government's interest in terminating such disruptive employees:

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively as possible. When someone is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operations,

the government employer must have some power to restrain her.

Waters, 114 S.Ct. at 1887-88; see also Connick, 461 U.S. at 147.

Plaintiff's interest in engaging in such speech is weak. Plaintiff's liberty interest in speaking on matters of public concern is diminished by the fact that plaintiff used government property to do so. In addition, the benefit to the public of hearing plaintiff's views about privatization is counterbalanced by the harm to the public of wrongly believing that the Postal Service endorsed plaintiff's views. If plaintiff had spoken truthfully about privatization without disrupting his workplace in doing so, his interest in engaging in such speech would be stronger. See, e.g., Johnson v. Independent School District. 891 F.2d 1485, 1494 (10th Cir 1989) (plaintiff's use of disruptive public channels to air complaints about school district's medication policy diminished his interest in airing speech where there was no evidence that internal complaint mechanism would not be sufficient). Ms. Denny's reasonable determination however, that plaintiff used disruptive means to engage in such speech limits his interest in doing so. Plaintiff, therefore, cannot overcome the government's strong interest in terminating him. Accordingly, an accompanying order grants defendants' motion for summary judgment and dismisses the complaint.

s/ Louis F. Oberdorfer
USDJ

March 27, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEOFFREY WALDAU Plaintiff	)	
	)	Civil Action No. 95-1151-LFO
v.	)	
MICHAEL S. COUGHLIN, et al. Defendants	)	Filed JUN - 11 1997 Clerk, U.S. District Court District of Columbia

ORDER

For reasons stated in the Memorandum filed April 1, 1997, granting defendants' Motion for Summary Judgment and in Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's "Motion for [New] Trial, Reconsideration, and Correction of Material Errors," it is this 10th day of June 1997 hereby

ORDERED: that plaintiff's motion should be, and is hereby DENIED.

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5162

GEOFFREY WALDAU
Appellant

September Term, 1997

95cv01151

v.

MICHAEL S. COUGHLIN, et al.
Appellees

Filed OCT 31 1997
Clerk,
U.S. Court of Appeals
District of Columbia
Circuit

BEFORE: Wald, Silberman, and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed October 3, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/ *Robert A. Bonner*
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEOFFREY WALDAU Plaintiff	)	
	)	Civil Action
v.	)	No. 95-1151-LFO
MICHAEL S. COUGHLIN, et al. Defendants	)	Filed SEP - 26 1995 Clerk, U.S. District Court District of Columbia

ORDER

Upon consideration of defendant's motions for an enlargement of time and for a protective order, defendant's memorandum of points and authorities in support thereof, and plaintiff's memorandum in opposition, it is this 25th day of September, 1995 hereby

ORDERED: that defendants' motion for an enlargement of time should be and is hereby GRANTED; and it is further

ORDERED: that defendants' shall not have to respond to plaintiff's interrogatories until further Order of this Court; and it is further

ORDERED: that defendant's motion for a protective order should be and is hereby GRANTED; and it is further

ORDERED: that all discovery in this case should be and is hereby STAYED until further Order of this Court; and it is further

ORDERED: that plaintiff may file any opposition to defendant's motion to dismiss on or before October 12, 1995.

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Constitutional Provisions, Statutes and Regulations Involved

AMENDMENTS
Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

39 U.S.C.

Chapter 6 -- PRIVATE CARRIAGE OF LETTERS

Sec. 601. Letters carried out of the mail

(a) A letter may be carried out of the mails when --

(1) it is enclosed in an envelope;

(2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;

(3) the envelope is properly addressed;

(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;

(5) any stamps on the envelope are canceled in ink by the sender; and

(6) the date of the letter, or its transmission or receipt by the carrier is endorsed on the envelope in ink.

(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires suspension

(Pub. L. 91-375, Aug. 12, 1970, 84 Stat. 727)

Postal Service Employee Relations Manual

660 Conduct

661 Code of Ethical Conduct

661.11 This *Code of Ethical Conduct* is designed to instruct and guide employees entering the Postal Service, and to re-

mind all employees of the conduct expected and required of them in performing their official duties and their general conduct.

661.2 Congressional Code of Ethics for Government Service

661.21 The standards of conduct for all employees of the United States have been stated by Congress in the Code of Ethics for Government Service. All postal employees are expected to follow the standards quoted in Exhibit 661.21.

Exhibit 661.21

Congressional Code of Ethics for Government Service

Any person in government service should:

1. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or government department.
2. Uphold the Constitution, laws, and legal regulations of the United States and of all governments therein and never be a party to their evasion.
3. Give a full day's labor for a full day's pay; giving to the performance of duties earnest effort and best thought.
4. Seek to find and employ more efficient and economical ways of getting tasks accomplished.
5. Never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept, for self or family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental duties.
6. Make no private promises of any kind binding upon the duties of office, since a government employee has no binding word which can be binding on public duty.
7. Engage in no business with the government, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties.

8. Never use any information coming to employee confidentially in the performance of governmental duties as a means for making a private profit.
9. Expose corruption wherever discovered.
10. Uphold these principles, ever conscious that public office is a public trust.

661.3 Standards of Conduct
Employees must avoid any action, whether or not specifically prohibited by this Code, which might result in or create the appearance of:
a. Using Postal Service office for private gain.
b. Giving preferential treatment to any person.
c. Impeding Postal Service efficiency or economy.
d. Losing complete independence or impartiality.
e. Making a Postal Service decision outside official channels.
f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

661.52 Unofficial Use of Government Property or Services. No employee will use, directly or indirectly, or allow the use of Postal Service or government property or services, including property leased to the Postal Service or government agency, for other than officially approved activities. Employees have a positive duty to protect and conserve Postal Service property, including equipment, supplies, and other property entrusted or issued to them.

666.5 Obedience to Orders
666.51 Protests. Employees must obey the instructions of their supervisors. If any employee has reason to question the propriety of a supervisor's order, the individual will nevertheless carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through official channels.

Other Material the Petitioner Believes Is Essential to Understand the Petition

5 USC 2302(b)(8) provides that it is a prohibited personnel practice to:

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of --

(A) any disclosure of information by the employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of national affairs; or...

Code of Federal Regulations

5 CFR 1209.6 Content of appeal; right to hearing.

(b) *Right to hearing*. An appellant has a right to a hearing.

(c) *Timely request*. The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

5 CFR 1209.7 Burden and degree of proof

(a) Subject to the exception stated in paragraph (b) of this exception, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a

preponderance of the evidence that disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

Detailed Statement of Facts[30]

Petitioner, Geoffrey Waldau was employed by the United States Postal Service ("USPS") from 1979 until his termination on September 17, 1990. During the 1980's, the government undertook several private-sector restructurings. It divested AT&T to encourage competition in telecommunications markets, and privatized Conrail with a $1.6 billion initial public stock offering (IPO). Congress voted to adopt a Conrail IPO, after intensive debate on different privatization alternatives by the parties (i.e., Conrail, the U.S. Department of Transportation and several investment banking firms).[31]

Since 1845, the Post Office has had a monopoly over letter mail and mail-box delivery. In 1970, the USPS became an independent establishment of the federal government, and the

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[30] Under Rule 15(2), "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived *misstatement of fact* or law in the petition that bears on what issues would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." (emphasis added)

[31] See, e.g., "Arriving soon: the biggest-ever IPO," Fortune, March 30, 1987, p. 9; Smith, Lee, "Is this any way to sell a railroad?" Fortune, May 25, 1987, p. 91-98,

monopoly continued. The USPS may suspend any part of its monopoly where in the public interest, and has done so for extremely urgent, overnight letters. Any creation, issuance or sale of USPS stock would first require an Act of Congress and Congressional approval.

Prominent policy officials expressed their views. President Bush stated that he would not preclude private industry from "moving in" to compete with the USPS. Opposing postal competition and privatization in 1990 were postal unions, Anthony Frank, Postmaster General (PMG), Robert Setrakian, Chairman of the Postal Service Board of Governors (BOG), and Charles Hawley, Assistant General Counsel (who was involved in rulemaking opposing international remailing competition). See, App. 10[32]. Supporting restructuring were John Ryan, Vice Chairman BOG, James C. Miller III, former Director Office of Management and Budget (OMB) under President Reagan, and several conservative think tanks (e.g., Cato, Eli & Company, Heritage). App. 54-55 ¶ 30.

In 1988-89, Waldau's office, the Office of Delivery and Customer Service Operations, was responsible for setting operating policy which effected efficiency and service quality. In 1989-90, the role of Waldau's reorganized office, the Office of Performance Management, was to research, conduct studies and recommend ways to improve the performance (efficiency and service quality) of the USPS. App. 55 ¶ 30; App. 122 ¶ 42; App. 87. Waldau's new office carried over duties and personnel (e.g., Michele Denny) from the old office. Waldau's duties were generally to reasearch and analyze USPS performance, employ econometric modeling and statistical methods, prepare and make presentations to postal managers, and recommend improvements.

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[32] Record documents cited in the Petition Appendix may be found in Appellant's Appendix ("App.") attached to "Opposition to Motion for Summary Affirmance and Motion for Summary Reversal or Remand of Record," filed with the U.S. Court of Appeals for District of Columbia Circuit, on Aug. 29, 1997.

During the 1980's, the USPS was expected to respond to questions concerning privatization. App. 130 ¶ 47. Waldau, as a staff economist, was assigned duties to prepare answers to questions from government agencies on privatization issues, participate in work groups on privatization issues, and keep abreast of privatization issues. App. 44 ¶ 1; App. 82, 85; App. 130 ¶ 47. In 1988, Waldau was asked to assist in preparing responses to privatization cost reduction proposals from OMB in conjunction with the President's budget (e.g., contracting out, joint ventures with competitors). See, e.g., App. 63; App. 52 ¶ 24; App. 84. Waldau wrote a letter for signature by his office director, N. Barranca, initialed by his supervisor Michele Denny as "Md," detailing several privatization recommendations. App. 63. For example, one of Waldau's recommendations was, "No rational economic argument can be made for ending USPS parcel post and Express Mail service [thereby letting private sector be sole provider]." App. 64;. Waldau's recommendations were sent to OMB, attached to a letter by Comer Coppie, Senior Assistant Postmaster General (SAPMG), Finance. App. 68-71. As part of the assignment, Waldau read the "Report of the President's Commission on Privatization" which sparked the OMB's inquiry, referenced a 1986 Ely & Company report on privatizing the Postal Service, and read other reports containing discussion of various privatization alternatives (e.g., contracting out to private sector, permitting competition from private sector, selling postal assets to private sector). App. 66, 97-107; App. 90 ¶ 23. Waldau was praised for doing "extremely well in conceptual issues." App. 84.

In 1989, assigned to the new office, Waldau officially attended a Brookings Institute conference on postal restructuring. App. 90 ¶ 23. In 1990, he also worked in the Private Sector Council taskforce to consider private-sector planning methods within the Postal Service (e.g., resource planning, strategic planning for competitor threats, opportunities, strengths, weaknesses, etc.). Waldau was assigned because of his creativity and expertise in privatization issues from

working on the President's budget. The privatization issue was discussed briefly. App. 72-75; App. 53 ¶ 26. Waldau's other 1990 duties included, "coordinate operations cost reductions for President's budget," "prepare Board of Governor presentations," and "respond to questions on... privatization." App. 85. Waldau's supervisor Ms. Dobbins (in sworn testimony at a 1992 U.S. Merit Systems Protection Board jurisdiction hearing) admitted that Waldau's objectives were to answer questions related to "privatization issues," and was assigned to a task group to work on "the creative aspect of ideas of the private sector that we could use in the Postal Service." App. 76-78. When Postal Service Counsel (Ms. Forden) questioned Ms. Dobbins about Waldau's work on the "privatization task force," Dobbins testified that Waldau was assigned because of his "creativity" and "technical expertise... needed to make progress." App. 79. The USPS denies "any work in this area [privatization] encompassed by [Waldau's] present job responsibilities." App. 36.

Waldau's work and experiences within the USPS convinced him that a vibrant, robustly competitive postal industry would benefit the USPS, the industry and the American people, by bringing greater efficiency, lower prices, better quality services and more innovation. App. 45 ¶ 2. Waldau also believed employee stock ownership could create incentives for "performance, new ideas, new and better services" from current employees. App. 21.

Many, but not all, postal officials opposed competition and privatization in 1990. To promote opposition, internal discussions were organized, including the viewing of a USPS-produced video showing a "downward spiral" caused by competition. App. 121 ¶ 39. In public forums and employee communications publications, PMG Frank stated, "Privatization is unthinkable,"[33] and "Alternative [competitor] delivery dismays me, annoys me, angers me."[34] Mr. Setrakian

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33 Frank Talk, December 1990.

34 Speech before Direct Maketing Association, 1990.

stated that privatization would be "detrimental to the public at large."[35] App. 54-55 ¶ 30.

Waldau could not agree, but kept silent with his pro-competition views, waiting for a change in leadership and political winds. Meanwhile, he felt it reasonable and in the public interest to gather information on privatization by (1) conducting a small citizen survey in March 1990 and (2) preparing a proposal and presentation in June 1990, to be first delivered to the same group of investment bankers who had participated and provided early input in the Conrail privatization. Waldau knew the government officials involved in the Conrail privatization. Early investment banker input was obtained due to the many complex restructuring alternatives. Waldau believed these activities were consistent with his duties to be prepared to "answer questions on privatization" from time to time. App. 85; App. 130 ¶ 47. Waldau's duties were generally to research and analyze ways to improve USPS efficiency.

Waldau did not ask for nor receive express permission to use resources, letterhead or logo, as he believed routine practice of the office did not require permission. App. 124 ¶ 44. This understanding was shared by co-worker, James Carrier, who also conducted surveys with banks, and was not discharged. App. 87. Waldau was unaware of any policy prohibiting the use of the USPS letterhead or logo in gathering information or expressing a viewpoint related to assigned work. Waldau was a "very-good" rated employee, had used postal resources in self-initiated projects in the past without needing express permission, had no prior disciplinary problems, was never cited as disruptive, and got along well with his superiors and co-workers. See. e.g., App. 47 ¶ 8; App. 55-56 ¶ 30-31; App. 92 ¶ 38; App. 120 ¶ 39; App. 80, 83.

In July of 1990, Waldau arranged to speak to members of five Wall Street investment banks on the topic of postal privatization in New York City ("NYC"). Due to an

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35 Postal Life, 1989.

unexpected acceleration in a friend's travel plans to NYC, Waldau made phone calls to inquire about interest in his speech instead of sending letters.

Waldau concedes that the USPS was not seeking to become privatized, nor was he an official spokesperson on behalf of the USPS on privatization issues, nor was he a prominent policy-level official. He identified himself as a "senior economist," as being descriptive of his position and education. Waldau stated he would be the only postal employee attending. The USPS was not reliant on Waldau to express or maintain its opposition to competition and privatization. Although, Waldau answered questions and provided economic analysis of privatization issues, USPS management could accept or reject Waldau's recommendations. Waldau was not considered a management employee.[36]

Prior to delivery of the speech, one of the bankers informed Stephen Kearney, Treasurer of the USPS, of Waldau's intention to deliver his address, and asked for information on Waldau's identity and the relationship between the speech and a Request for Proposal (RFP). Waldau had inquired about interest in his speech with the Goldman Sachs Mergers Department, who informed Neil Levin and Gary Rose (Goldman Sachs relations managers for the USPS), who called Kearney. On July 5, 1990, Mr. Kearney called Waldau to inquire about the speech. Unknown to Waldau, the treasurer had just issued an RFP for a financial advisor to raise capital through debt instruments. Goldmand Sachs did not ask Waldau whether there was a relationship. Waldau told the treasurer he was working on private-sector issues in the Private Sector Council, was giving a speech supporting competition and privatization and invited Kearney or his representative to the meeting. App. 57 ¶ 34. Kearney said he didn't know, and first wanted to talk with his superiors. Later in the

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[36] See, *Waldau v. Merit Systems Protection Board*, 19 F.3d 1359 (Fed. Cir. 1994), [Waldau was ultimately denied MSPB jurisdiction in 1995 because he was not a USPS management employee].

day, he called back and informed Waldau there would be "political" misunderstandings/issues and the Postmaster General did not want to get "blindsided and debate the issue in the financial press." Kearney ordered Waldau to not give the speech. App. 96; App. 129 ¶ 45. In 1988-1990, it was publicly known that the USPS opposed any "legislative changes" towards privatization. See, e.g., App. 68. Waldau offered Kearney an opportunity to preview the presentation and offered to make it confidential. App. 32. Kearney only reiterated the order. Waldau acceded under pressure.

Michele Denny, Waldau's director, learned of the privatization speech from Kearney, and on Friday, July 6, 1990 at 5:30 PM, reiterated the treasurer's order to Waldau, to not give his speech. App. 51 ¶ 20. Denny did not question Waldau's use of resources on privatization, as he was currently assigned in the Private Sector Council work group where such issues could be addressed. App. 53 ¶ 26; App. 131. Ms. Denny ordered Waldau to first consult with the Postal Service Assistant General Counsel, Charles Hawley, before pursuing privatization issues any further, and said, "If you hold the meeting, start looking" [for another job], as Waldau would "jeopardize" himself and the Postal Service. App. 91 ¶ 37.

Waldau first canceled the speech. However, upon hearing disappointment from one of the bankers, that the banker wanted to hear what Waldau had to say, and considering what he believed to be his constitutional rights, Waldau rescheduled it for July 11, 1990, as a citizen. This speech would take place in NYC, at the offices of Morgan Stanley, while Waldau was on vacation leave from July 9-13, on his own time and expense. He emphasized to all bankers that it would be "unofficial, informal, confidential, and have nothing to do with the treasurer's RFP" for a financial advisor. App. 50 ¶ 17-18; App. 57 ¶ 34, App. 60. When asked, Waldau told of the opposition and internal debate within the USPS. Considering the antagonism and hostile reaction towards his viewpoint and speech, and proceeding as a citizen, Waldau

did not inform Kearney or Denny of the rescheduled speech. On July 10, Waldau told investment banker Joel Cooper from Salomon Bros. about the USPS's opposition to the meeting, and Mr. Cooper called the treasurer to check. App. 59, 132; App. 89 ¶ 17. On July 11, 1990, Waldau showed up at the appointed time and place to deliver the speech, only to learn that Mr. Kearney had canceled it, despite Kearney's knowing from Denny that Waldau was speaking on his vacation leave. No banker heard the speech or saw the presentation materials.

Waldau was ordered back to headquarters. On July 13, following up on the cancellation, Ms. Denny met with Waldau and his immediate supervisor, Lisbeth Dobbins, for about an hour. Waldau told Denny and Dobbins that "he was acting on his own and that the privatization issue was his personal interest." App. 40 ¶ 5. Ms. Denny states in her declaration that Waldau said he "represented himself as a senior economist with the Postal Service" to the bankers. Id. Waldau was in fact an economist at the Postal Service, first hired as a "Senior Economist" in the Rates and Classifications Dept., with a masters degree in economics, and held the title "Operations Performance Analyst - Principal" at the time of his removal.[37] App. 88 ¶ 17; App. 122 ¶ 42; App. 134. At this meeting, Waldau was asked to give his intended July 11 speech. The presentation included fifty overhead transparencies and discussed innovative services which may emerge in a competitive industry, the possibility of employee stock ownership, a vision statement, steps of Waldau's implementation plan to build consensus and obtain the necessary legislation, etc.. App. 20-27. The transparencies displayed the American flag, U.S. Capitol, postal eagle logo and mailboxes to add visual interest, and lend credibility to Waldau's claim that he

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[37] Waldau is currently an economist with the Public Service of Commission of Maryland testifying in support of opening the telecommunications industry to competition. See, e.g., 85 MD PSC, 38, 42, 45 (1994).

was, in fact, an employee of the USPS. App. 122 ¶ 41. The speech was inoffensive in content and tone and not critical of the USPS or any specific postal managers. App. 45 ¶ 2.

Waldau intended to make clear that the views expressed were his own. App. 95. Waldau's inquiries, invitations and speech made no statement that the USPS was officially seeking to be privatized, nor that there was universal agreement with his views, nor that his views were those of senior postal management, nor that he was speaking officially on behalf of the USPS. App. 122 ¶ 41. For balance of viewpoint, Waldau did discuss the "Case Against Privatization." App. 26. The bankers were to be asked "to test [Waldau's] proposal," and find out answers (from Congress) to "key questions." App. 27, 96.

Waldau also told his superiors at the July 13 meeting that he had conducted a survey in March 1990 soliciting the public's views on restructuring the USPS. App. 41 ¶ 6. The survey included a March 1, 1990 letter addressed to "Postal Customer" on USPS letterhead stating, "The proposal contains the viewpoints of some economists" and signed, "Geoff Waldau, Senior Economist." The survey asked participants ten questions. Waldau gave each survey participant a pre-addressed, pre-paid USPS envelope to return the survey. Because of the hostile position taken by postal officials towards privatization, Waldau prepared this survey at work and at home, and he handed out fifty of these surveys to people at airports. No respondent complained about the survey. The majority (77%) of the 35 citizen respondents expressed support for postal competition, and many would support an employee stock ownership plan. App. 13-19. Copies of the survey were to be distributed to the bankers during the speech.

Ms. Dobbins inquired whether the presentation and survey had been prepared with USPS equipment and supplies and on government time. Waldau said "yes" and asked his superiors whether they considered it improper, to which Dobbins replied, "I don't know. We'll see." App. 46 ¶ 5. Denny told Waldau, "Maybe we can get some of these ideas

discussed." App. 120 ¶ 39 After the meeting, Waldau's superiors placed him on administrative leave. Waldau would never return to on-duty status.

On August 12, 1990, Dobbins met with Waldau again and showed him a draft letter of charges, which stated the matter had been referred to the Dept. of Justice (DOJ) for prosecution. Dobbins offered to forego prosecution if Waldau voluntarily resigned. App. 46 ¶ 7. Unknown to Waldau at the time, the USPS had previously inquired with the DOJ which declined to prosecute on August 2. Waldau politely declined and asked who had drafted the letter, to which Dobbins replied, "some lawyer in the Law Department." The government "strongly" denies threatening Waldau with federal prosecution. Appellee Opp. at 6.

On August 16, 1990, Ms. Dobbins sent him "Notice of Proposed Removal" no sooner than 30 days thereafter. App. 28-30. The threatening language was removed. The Notice charged several infractions to employee regulations: (1) unauthorized representation of the USPS in connection with the survey and the canceled July 11, 1990 speech; (2) use of USPS property for unofficial activities; (3) disobeying instructions of a supervisor by failing to cancel the July 11 speech as directed; and (4) disobeying instructions of a supervisor by failing to meet with the USPS Assistant General Counsel, as directed. The Notice concluded with an invitation for Waldau and/or his representative to review the "material relied on to support the reasons" for the Notice, and to answer within 10 days. App. 30.

Waldau answered the charges on August 20, 1990. He stated that he had "no intention of misrepresenting the Postal Service's 'official' position on privatization nor financially obligating the Postal Service." App. 32. He also stated that he "tried to make clear to the investment bankers by stating that the meeting was unofficial, informal, confidential [and] had nothing to do with the RFP on issuing debt." This effort to explain the unofficial and informal nature of the rescheduled meeting was successful, as documented by Mr.

Edward Higgins of Merrill Lynch who recorded his July 9 telephone conversation with Waldau. App. 60.

> Post Office Privatization
> Jeff Waldau (212-355-7300 x1702 Beekman Tower Hotel)
> Postal Service
> 31st Floor - Morgan Stanley
> Avenue of Americas
> Unofficial Meeting - Informal + Confidential
> Treas Debt - RFP Out - FA [financial advisor] for Debt
> Non Official - Informal - Not Related to Treas Dept.
> Some Support for Privatization - But not formal
> (cy - Treasury Dept. Wanted to Cancel the Meeting to "Avoid Political Sensitivities/ Issues")
> Privatization - Productive/Feasible? (Internal Debate)

In the past, Waldau's superiors had encouraged his creative projects and a former Postmaster General (Paul Carlin) had even required all managers to read the popular book In Search of Excellence. PMG Carlin required all managers to meet to discuss how to implement this book's contents. Ms. Denny, in complying with this directive, held her meeting in Potomac, MD, with Waldau and other professionals on her staff. App. 53 ¶ 27. In Search of Excellence encourages "an ambitious researcher to engage in clandestine work which is surreptitiously financed for another project" and "unauthorized research" also described as "skunkworks." In this book, the concept of "champions" was presented to encourage employees to go "outside the system" to "experiment with customers." App. 34. Waldau also stated in his response, "I was trying to be the Postal Service's restructuring champion because I think the Postal Service would benefit from it enormously." App. 31. Also in his Aug. 20 response, Waldau apologized, offered to correct any misunderstanding by paying for the resources used ($19 cost + $300 penalty), and perform additional project work.

In a four-page letter dated August 29, 1990 terminating Waldau's employment, Ms. Denny (assisted by a USPS lawyer) asserted "that the charges, as stated in the notice of August 16, 1990, are fully supported by the evidence and warrant your removal." App. 35. The letter ("Denny letter") asserted that she had given "full consideration" to Waldau's "written answer of August 20, 1990, all the other evidence of record." That "other evidence of record" included an investigation conducted by Postal Inspector J. Sinnen after the canceled July 11 speech. Id. The Denny letter stated that the evidence in support of each charge, alone, was sufficient to justify dismissal.

On July 20, postal managers had directed the Postal Inspection Service to investigate Waldau's speech. The Postal Service law enforcement arm sometimes investigates and enforces monopoly restrictions, with intimidating effect on the customers of competitors. See, e.g., App. 94. Inspector Sinnen searched Waldau's work area, seized evidence of pro-competition reading materials, audited the calls made from Waldau's telephone, and interrogated Waldau, the investment bankers, and Denny and Kearney. The government denies any attempt at intimidation.

Sinnen obtained evidence from investment banker Higgins who had participated in U.K. privatizations and had taken copious notes of his July 9 conversation with Waldau, noting "unofficial and informal". Mr. Cooper of Salomon Bros. wrote in his statement that Waldau stated "[because of the treasurer's] opposition the meeting had officially been cancelled. However and informal meeting would be held at the same time and place." App. 59. Mr. Terrell of First Boston wrote, "Mr. Waldau disclosed in our telephone conversation that while there was no clear directive within the Postal Service to pursue such an initiative [privatization], he thought such a meeting would, nevertheless be productive." App. 50 ¶ 18. Ms. Libstag of Goldman Sachs wrote, "Mr. Waldau suggested a possible public offering would be discussed at the meeting." Mr. Bockman of Morgan Stanley

wrote, "Mr. Waldow [Waldau] stated that he wanted to bring the investment banking community up to date on the current thinking within the Postal Office regarding privatization." On August 1, Waldau asked Inspector Sinnen to confirm his exact words "unofficial, informal, confidential, and nothing to do with the RFP" that Waldau communicated to all the investment bankers, to which Sinnen immediately replied, "although they differ in what they remember, they pretty much confirm what you say." App. 89 ¶ 17.

However, Sinnen wrote in his Aug. 8, 1990, unsworn investigative memorandum, "Mr. Higgins stated Mr. Waldau wanted to set up an unofficial, confidential, and informal meeting to discuss the prospective privatization of the Postal Service. Higgins stated Mr. Waldau led him to believe the meeting was sanctioned by the Postal Service." However, Mr. Higgins later wrote in an August 16 statement to Sinnen that Waldau only "indicated" the treasurer "decided to permit the meeting to proceed." App. 61 ¶ 5. Waldau admits to the contents of Higgins' July 9 note, and that his speech would be looking towards the future, but denies ever indicating, stating, or implying to any banker the treasurer had "decided to permit the meeting to proceed [despite opposition]" or "sanctioned the meeting." No other banker heard or wrote these words. Sinnen also wrote in his Aug. 8 memorandum, "Ms. Denny stated that she advised Mr. Waldau to meet with Charles D. Hawley, Assistant General Counsel, concerning conflict of interest and the misperception on Wall Street that Mr. Waldau was acting on behalf of the Postal Service."

However, the government concedes Denny never actually contacted the investment bankers herself. App. 126-127. No banker heard, or wrote that Waldau stated he was speaking "on behalf of the Postal Service" nor did they write that they thought the Postal Service was officially seeking to become privatized. With a court-ordered bar on discovery, Waldau can not prove whether or not Inspector Sinnen made such a claim in any sworn or unsworn statement or verbally. No banker criticized the meeting or the way it was set up.

The government asserts in brief, "A Postal Inspector had contacted these individuals [bankers] and learned that appellant [Waldau] gave them the impression that he would be speaking on behalf of the Postal Service." Appellee Opposition at 5. However, Inspector Sinnen did not write this in his memorandum (nor did the government introduce a sworn statement from Sinnen), nor did Ms. Denny write this in her 1990 or 1996 sworn statements. App. 39-43, 131-133.

Denny wrote in her 1990 statement to Sinnen that Goldman Sachs asked the treasurer (on July 5) whether "Geoff was a USPS financial advisor, and/or did he work for the treasurer, and was there a relationship between this meeting and a Request for Proposal (RFP) that was currently on the street." (Goldman Sachs never asked these questions directly to Waldau.) Ms. Denny also wrote, "[on July 6] We [Denny and Waldau] had a discussion about 'conflict of interest' and the misperception that in contacting the Wall Street firms he was acting on behalf of the USPS... Geoff said [to an investment banker on July 10] there was a misunderstanding and that the meeting would be 'informal' ..., Steve [Kearney] said I should just stop Geoff from going to New York. I then restated that Geoff was on vacation leave and that I wasn't able to get in touch with him and that even if I did I didn't know if it was appropriate for me to tell him what to do or not to do on his own time." Denny also wrote, "Art [Porwick] asked if this was an official assignment. I stated that I wasn't sure if it was connected to the Private Sector Workgroup that Geoff was involved in or something he was pursuing on his own." App. 131-133. Denny writes in her 1990 and 1996 declaration, "He said that his intent was to get all the interested parties together first and then let them know that this was an idea he was pursuing on his own and that the Postal Service was not involved." App. 40-41.

The last assertion is incorrect. Waldau really stated to Denny and wrote in his 1990 statement to Sinnen, "It [was] my intent to tell them at the meeting the views expressed are my own [if there was any confusion]." App. 95. Waldau

truthfully told the bankers the subject of the speech, and tried to clear up any confusion prior to the speech. He believed they understood the unofficial nature of the speech as there was a long public record of USPS opposition to privatization, no Congressional mandate authorizing privatization, and world-wide controversy surrounding privatization.[38] Waldau

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[38] See, e.g., Gayle, D., and Goodrich, J., editors, Privatization and Deregulation in Global Perspective, Quorum Books, 1990, p. 1, ("At least since 1978, privatization and deregulation have continued to provoke intense controversy as to the acceptable applications and inherent implications of such public policies."); Ascher, K., The politics of privatization: contracting out public services, Macmillan Education LTD, 1987, p. xiv, ("Contracting out -- the private provision of public services -- has recently become a salient and controversial issue in British politics."); Clutterbank, D., Going Private: Privatizations Around the World, Mercury Books, 1991, p. vii, ("What virtually all privatizations have in common is that the organization has had to undergo radical and uncomfortable change to enable it to survive in the competitive world of the private sector."); Kikeri, S., et al, Privatization: The Lessons of Experience, The World Bank, p. 1, ("Privatization when correctly conceived and implemented, fosters efficiency, encourages investment (and thus new growth and employment), and frees public resources for investment in infrastructure and social programs."); Martin, B., In the Public Interest: Privatization and Public Sector Reform, Zed Books, 1993, p. 1, ("Privatization and commercialization imposed from the outside by agencies such a the World Bank and International Monetary Fund (IMF), or by national governments to serve ruling elites, are resulting in massive concentration of wealth and are transferring power to remote bodies beyond reach of political accountability."); Tomasko, R., Downsizing: Reshaping the Corporation of the Future, American Management Association, p. 39, ("Successful implementation of privatization projects frequently mandates management and staff streamlining as goals shift from providing employment to increasing earnings."); Porter, M., The Competitive Advantage of Nations, The Free Press, p. 247, ("The inefficiencies of public institutions are widely recognized. In many service industries, there has been a movement to let private companies become involved in order to enjoy their growing efficiencies and the benefits of competition."); Osborne, D., and Gaebler, T., Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector, Addison-Wesley, 1992, p. 82, ("Consider the U.S. Postal Service -- with 760,000 employees, our largest civilian monopoly. We

also wrote, "I answer OMB inquiries," and my objective was "to gather and share information," and "eventually bring this information to Postal management's attention." App. 95-96. One presentation transparency included the steps of Waldau's plan. The fourth step, after testing proposal with Congress, would be to "Contact Postal management [and] (Board of Governors)" to inform them [if Congress was receptive]. App. 27.

Kearney wrote in his 1990 statement to Sinnen, "[Waldau] explained that as part of his work for the Private Sector Council task force, he called the meeting to discuss privatization and selling stock in the Postal Service." When Kearney first called, Waldau did mention that the privatization meeting was related to his work on the Council, only because Waldau's assignment to the Council was his most current privatization-related project. Waldau was gathering information, and never stated nor implied that actually privatizing or selling stock in the Postal Service was a specific charge delegated to him from that task force. App. 53 ¶ 26; App. 128 ¶ 45.

Assistant General Counsel Hawley and Deputy Postmaster General, Michael S. Coughlin (the highest ranking postal official ultimately responsible for employee disciplinary matters), received a copy of the Inspection Service memorandum, which included the above evidence as attachments. App. 9; App. 48 ¶ 11-12.

On Charge 1, the Denny letter determined that although Waldau stated that he did not intend to misrepresent the Postal Service's views before and during the aborted July

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all know the Postal Service is inefficient... In 1973, it tried, unsuccessfully, to suppress private courier services -- even though it was not willing to offer same-day service itself. In the 1970s, it refused to offer overnight express service -- until Congress let its private competitors into the market... In contrast, public monopolies that are thrust into competition have little choice but to please their customers.") See also, "Amtrak: the case against privatization" [views of W. G. Claytor] Railway Age, July 1988.

11, 1990 speech, the transparencies he prepared for the speech displayed the Postal Service logo throughout the presentation, "thereby creating the impression that [they] had been prepared by the Postal Service and expressed the views of the Postal Service." App. 35. "In addition, individuals representing the investment firms told Postal Inspector Sinnen that you represented to them that you were speaking on behalf of the Postal Service." Id. The letter also stated that the "Postal Service did not give you authority to pursue this issue or to make any representations on behalf of the Postal Service, nor, is any work in this area encompassed by your present job responsibilities." App. 36. "In fact, the mission of our office has nothing to do with privatization. By engaging in these activities, you created the false impression that the Postal Service had decided to pursue the privatization issue" and you "created the appearance of making a Postal Service decision outside official channels." Id. The letter stated that Waldau introduced [himself] as an economist, and charged, "in fact, you do not hold that position." Id. The letter stated, "For these reasons, I find your statement that you did not intend to misrepresent the Postal Service's position on the privatization issue highly questionable." Id.

Waldau denied charges 1. Waldau maintains he was an economist, and denies speaking officially "on behalf of the Postal Service" because he stated the meeting was "unofficial and informal" as corroborated by Inspector Sinnen. Waldau never made or intended to make any promises binding upon the Postal Service. Not being an officer of the USPS, Waldau could not make any promises which would ever be binding upon the USPS.

It does not appear from the investment banker statements that Sinnen attempted to resolve the "highly questionable" allegation conclusively by asking all the investment bankers the direct, unambiguous question -- of whether they thought Waldau would be speaking officially on behalf of the USPS seeking to become privatized, or unofficially expressing his own views. It appears that Inspector Sinnen, in his

first round of questioning, did not find any illegal activity, and finished the investigation on Aug. 8. After a decision was made to fire Waldau (on or before Aug. 12), it appears that he resumed the investigation to obtain evidence to justify the action. It appears he conducted a follow-up interview with only Higgins to get in writing the "sanctioned" quote. However, from Higgins' Aug. 16 statement, it appears that the U.K. native may have been intimidated being investigated by a foreign government, or only thought the treasurer decided to permit the speech to proceed despite official opposition. Regardless, the USPS ignored this clarification from Higgins in its Aug. 20 Denny letter, using instead the more damaging "sanctioned" quote against Waldau.

On Charge 2, the Denny letter charged that Waldau used government materials for unauthorized activities in disseminating the privatization surveys. The letter asserted that Waldau's offer to reimburse the Postal Service [$319] and perform extra work [to make up for time] did "not take into account time taken away from [his] assigned Postal Service duties, nor the cost of the telephone, computers, or the supplies used in the creation of your presentation." "Second, your offer cannot repay the Postal Service for the intangible losses associated with the illegal use of its property." App. 36. The letter also asserted that the integrity of the Postal Service's rules and regulations was "weakened by the type of activity in which you have engaged." "Your offer falls far short of making the Postal Service whole, nor does it excuse your misconduct. This charge alone warrants your removal." Id.

Waldau denies charge 2. Waldau denies "illegal" use of resources, because as a professional, he was authorized to use office resources and did so consistently with routine office practice. This routine office practice did not need express permission for *de minimus* usage. Waldau was assigned to answer questions on privatization, frequently read and took notes on the subject, and was never instructed to stop using office resources on privatization, because it was part of

his job. Waldau had prepared his survey and speech overheads before receiving the orders prohibiting his speech. Prior to August 12, Waldau was never informed that the use of postal resources or symbols in debate was considered improper or "illegal." On August 12, Waldau did not refuse to stop expending resources after first being told such use was considered "illegal." He did not use any resources afterwards. Waldau did not use these USPS resources for personal gain, and he offered to increase his reimbursement to the USPSto $1,000, but this offer was also rebuffed.

On Charge 3, the Denny letter determined that Waldau had disobeyed her and Treasurer Kearney's separate instructions to cancel the July 11, 1990 meeting [was] "willful and inexcusable, especially in light of the fact that [he] deliberately lied to [Denny] and to Mr. Kearney when [he was] questioned about the meeting." This "lie" referred to Waldau's not canceling the meeting, not telling Denny about the rescheduled meeting and the reference to work in the Private Sector Council. The letter charged that Waldau was "deceptive in [his] attempts to hold the meeting, despite instructions not to." App. 36-37.

Waldau denied Charge 3. Waldau denies insubordination, because he did not refuse to perform work or stop expending resources on privatization. He thought speaking on his on own time and off premises was his constitutional right. Waldau denies "deliberately lying." He truthfully told the bankers, Kearney and Denny his speech would support competition and privatization. Under threats and orders, Waldau acceded to canceling the speech. He did so, but later, believing he had a right to free speech, rescheduled the meeting emphasizing its "unofficial and informal" nature. Sensing hostility toward his viewpoint, Waldau did not inform his superiors that the speech was rescheduled, because he felt intimidated and did not want to provoke another round of confrontation and threats. The speech was rescheduled to occur on Waldau's own time while he was on vacation from the USPS. Waldau did not disobey orders to perform work

assignments nor did he lie to citizens or the investment bankers, and he believed that no "false impressions" were created.

On Charge 4, the Denny letter charged that Waldau had not met Charles D. Hawley, the Assistant General Counsel, and "proceeding with unauthorized activities without the benefit of legal advice" concerning "possible conflict of interest and misrepresentation." App. 37.

Waldau denies charge 4. He admits he did not meet Mr. Hawley before his speech, as the order was given at 5:30 PM on Friday night before Waldau's vacation leave. Waldau did not refuse to meet with Hawley, and would have set up a meeting on his return from vacation. He did call Hawley on August 1 to ask for Postal Service legal advice concerning the ongoing investigation, to which Mr. Hawley replied, "No, it would be a conflict of interest." App. 91 ¶ 37.

Finally, the Denny letter noted that Waldau "apologized" and "promised not to engage in these activities in the future" but identified several instances in which Waldau had allegedly persisted in "pursuing the privatization issue within the Postal Service" after Waldau had been placed on administrative leave. Waldau, for instance, wrote in his Aug. 20 response to the letter proposing removal he wanted to return to work to make "several presentations to Postal employees on privatization." App. 32. Thus, according to the letter, Waldau had "no intention of ceasing these unauthorized activities." App. 37.

Picking up on Ms. Denny's earlier July 13 suggestion (i.e., "Maybe we can get some of these ideas discussed."), Waldau believed an internal presentation supporting competition and privatization would bring a fair, reasonable and balanced viewpoint within the Postal Service. Ms. Denny did not respond to Waldau's request other than the brief mention in the letter. Also, Waldau had left a telephone message with the PMG and two members of the Board of Governors asking for help, which were not returned, and he also discussed privatization issues with a postal union economist at the union's

offices in Washington D.C. while on administrative leave. App. 129 ¶ 46.

The Denny letter concluded that Waldau's conduct had been "detrimental" to the "efficiency" of the Postal Service. App. 37. "You have demonstrated that you cannot be trusted to perform your job as directed. I also question your ability to use good judgment, and I find it difficult to believe that you would obey my instructions and cease your unauthorized activities if you were to return to work." App. 37-38.

In 1993, a newspaper article appeared supporting Waldau and his viewpoint. App. 93. In 1996, a super majority (96%) of the U.S. Congress and President enacted the Telecommunications Act of 1996, opening the entire monopoly local telephone industry to competition, just as Waldau had proposed for the postal industry in 1990. In June 1997, the Communications Satellite Competition and Privatization Act of 1997 was introduced in the House of Representatives. Similar postal legislation was debated in the House in 1995. The Washington Post reported that privatization debate was "welcomed" by the new Postmaster General, Marvin Runyon, appointed in 1992, "unlike his predecessors [e.g., PMG Frank in 1990]."[39] App. 11-12.

Unknown Relevant Facts

A trial was necessary to determine relevant and unknown facts, e.g., who really was ultimately responsible for firing Waldau (e.g., Frank, Coughlin, Hawley) and what were his motives?; what were Waldau's privatization duties?; why did the Denny letter charge Waldau with not being an economist?; what was the routine resource usage practice in Waldau's office?; would Waldau or any employee have been discharged if he had prepared a speech on another postal

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[39] McAllister, W., "Talk of Privatizing the Postal Service Arrives at Congress's Door," Washington Post, January 18, 1995.

topic (e.g., postal careers at high school career night) using the same resources and symbols?; what did Inspector Sinnen tell and hear from the bankers and what did he tell Waldau and Denny about what he heard?; did Sinnen follow up and ask all the bankers whether they thought Waldau was speaking officially on behalf of the Postal Service seeking to become privatized, or unofficially as an employee expressing his views?; could U.K. banker Higgins have been intimidated when interrogated by a foreign government (U.S.) if or when he said he thought the meeting was "sanctioned?"; did Denny read Sinnen's memorandum and the statements of investment bankers and note inconclusive statements?; why did the USPS decision rely on an unsworn investigative memorandum asserting banker Higgins said the meeting was "sanctioned" when the MSPB has found such evidence "not sufficiently probative"?[40]; did Denny want to interview the bankers herself and find out the truth about the nature of the meeting but was told not to by her superiors?; what was said between Denny and Hawley?; why did Dobbins meet with Waldau to show him a letter proposing termination (on Aug. 12) and threaten him with prosecution before the investigation was completed (Higgins Aug. 16 statement)?; why didn't the Denny letter include the Higgins statement words "decided to permit meeting to proceed" instead of the memorandum statement "sanctioned"?; why didn't the Denny letter include the words "unofficial and informal" found in the investigative memorandum and the word "informal" heard from Kearney?

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[40] See, *McDonald v. USPS*, 20 MSPR 587 (1984) [unsworn investigatory memorandum not considered sufficiently probative to support the agency charges, so the removal was reversed.]